EDITOR'S NOTE

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(7)

No. 84-1539-CSY
Status: GRANTED

Title: Michigan, Petitioner
v.
Rudy Blacel

Docketed:
March 29, 1985

Court: Supreme Court of Michigan

Counsel for petitioner: Thiece, Brian Earle

Vide:
84-1531

Counsel for respondent: Bretz, Ronald J.

Entry	Date	Note	Proceedings and Orders
1	Mar 29 1985	G	Petition for writ of certiorari filed.
2	May 1 1985		DISTRIBUTED. May 16, 1985
3	May 3 1985	X	Brief of respondent Rudy Blacel in opposition filed.
4	May 3 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	May 17 1985		REDISTRIBUTED. May 23, 1985
7	May 22 1985	X	Reply brief of petitioner Michigan filed.
8	May 28 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	May 28 1985		Petition GRANTED. The case is consolicated with 84-1531, and a total of one hour is allotted for oral argument.
10	Jun 14 1985	G	Motion of respondent for appointment of counsel filed.
11	Jun 21 1985		DISTRIBUTED. June 27, 1985. (Motion of respondent for appointment of counsel).
12	Jul 1 1985		Motion for appointment of counsel GRANTED and it is ordered that Ronald J. Bretz, Esquire, of Lansing, Michigan, is appointed to serve as counsel for the respondent in this case.
13	Jul 12 1985		Joint appendix filed.
14	Jul 12 1985		Brief of petitioner Michigan filed.
15	Aug 12 1985		Brief of respondent Rudy Placel filed.
16	Sep 3 1985	G	Motion of respondents for divided argument filed.
17	Sep 16 1985	D	Motion of petitioner for divided argument filed.
18	Oct 7 1985		Motion of respondents for divided argument GRANTED.
19	Oct 7 1985		Motion of petitioner for divided argument DENIED.
20	Oct 22 1985		SET FOR ARGUMENT, Monday, December 9, 1985. (2nd case).
21	Oct 21 1985	D	Motion of petitioner to reconsider order denying motion for divided argument filed.
22	Oct 23 1985		CIRCULATED.
23	Nov 4 1985		Motion of petitioner to reconsider order denying motion for divided argument DENIED.
24	Dec 9 1985		ARGUED.

84-1539 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

RUDY BLADEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Dated: March 29, 1985

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QUESTIONS PRESENTED

Rudy Bladel was convicted by jury trial for the murders of three individuals. Admitted at trial was a statement made by Respondent during custodial interrogation. The interrogation occurred after arraignment in the State District Court wherein Respondent requested court appointed counsel. Respondent was advised of and waived his "Miranda Rights" prior to making the statement. The Michigan Supreme Court found that the interrogation violated Respondent's Sixth Amendment right to counsel and reversed the convictions. The questions presented are:

1. Whether the Michigan Supreme Court erred when it held that police interrogation of a criminal defendant after District Court arraignment was a critical stage in the proceedings such that the Sixth Amendment right to the presence of counsel is applicable?

2. Whether the Michigan Supreme Court erred in holding that the Sixth Amendment of the United States Constitution requires a "bright line" rule prohibiting police initiated interrogation after a criminal defendant has requested appontment of counsel at initial arraignment?

3. Whether the interests protected by the Sixth Amendment right to counsel and the "Fifth Amendment right to Counsel" during interrogation are sufficiently similar such that a knowing and intelligent waiver of Fifth Amendment "standard Miranda Rights" also constitutes a knowing and intelligent waiver of criminal defendant's then existing Sixth Amendment rights?

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IN THE

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No. ——

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PEOPLE OF THE STATE OF MICHIGAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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The Jackson County Michigan Prosecutor, on behalf of the People of the State of Michigan, petitions for a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of the State of Michigan, rendered in these proceedings and released on January 29, 1985.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, as yet unreported, appears as Appendix A, *infra,* pp. 1-41. The Michigan Supreme Court's prior remand order is published at 413 Mich. 864; 317 NW2d 855 (1982). The Opinions of the Michigan Court of Appeals are published

at 106 Mich. App. 397; 308 NW2d 230 (1981) and 118 Mich. App. 498; 325 NW2d 421 (1982). The Opinion of the Circuit Court was neither published nor written, but a copy of the relevant portion of the transcript of the Circuit Court proceedings appears as Appendix B.

JURISDICTION

The judgment of the Michigan Supreme Court was released on January 29, 1985. See Appendix A, *infra,* p. i. This Petition was filed less than 60 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defence."

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Respondent was convicted of the December 31, 1978 shotgun slayings of three railroad employees at the train depot in Jackson, Michigan. Respondent, a prime suspect in the slayings, was questioned by the police on January 1, 1979 and January 2, 1979. Before each interview Respondent was advised of his "Miranda rights" which he waived each time. (WHT 5, 8, 10 T 528, 532). During the first interview Respondent admitted that he was present in Jackson on December 31. (WHT 9, T 530). In the second interview he admitted that he had gone into the

train depot on the day of the murders, but did not admit any involvement in the murders. (WHT 11-15, T 533-537).

There was no further police contact with Respondent until March of 1979 when a shotgun was found on the outskirts of Jackson and was scientifically determined to be the murder weapon. Federal firearms records showed that Respondent had purchased the shotgun in Indiana. (T 538). A warrant was issued for the arrest of Respondent. He was arrested in Elkhart, Indiana on March 22, 1979. (WHT 15). Respondent waived extradition from Indiana. (T 539, WHT 22-23). During the waiver hearing, Respondent was advised of, but declined, the right to representation by counsel. (T 539, 572, 683-684, WHT 22-23).

Respondent was not questioned about the crime until he arrived back in Jackson on the 22nd. That evening, from 9:21 p.m. until 10:47 p.m., Respondent was interviewed by Jackson police. (T 540-575). Prior to this interview, Respondent was advised of his rights including his right to consult a lawyer before answering any questions, to have a lawyer present during questioning, the right to have an attorney appointed and an absolute right to stop the questioning at any time. (T 541-542, WHT 16-19). Detective Rand also read to Respondent a written rights form which Respondent also read. Respondent signed the acknowledgment and waiver portion of the advice of rights form (indicating that he would talk to the police), waiving the presence of an attorney. (T 542, WHT 19). This questioning was terminated when Respondent failed to answer any further questions. (T 545, WHT 21).

The Respondent was arraigned in District Court on March 23, 1979, at about 10:35 a.m., in the presence of Detective Rand. (District Court Arraignment p 2). The pertinent events at arraignment are recorded as follows:

> THE COURT: Now, because these are very serious charges which are brought against you, you have a

right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right sir. I'll place an affidavit in the file for you to make out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?

THE DEFENDANT: Right sir.

(Arraignment Transcript p 4).

On March 26, 1979, Sergeant Richard Wheeler and Lieutenant Ronald Lowe interviewed the Respondent in the County Jail. (T 589, WHT 31). The Respondent was given a copy of an advice of rights form to read while Wheeler read another copy to Respondent. (WHT 32). The Respondent was advised of each right individually. (WHT 33-34). He responded affirmatively when asked if he understood each right. (WHT 33-34). Respondent was then read the waiver portion of the form, which he indicated he understood. Respondent signed the waiver and said he did not want an attorney present at that time. (WHT 34). At no time during the interview did the Respondent ask to have an attorney present or to contact an attorney. (WHT 35). Neither Wheeler nor Lowe were

aware of Respondent's request for appointment of counsel made at arraignment until Respondent told them at the point during the advice of rights when counsel is mentioned. (WHT 39-40). Respondent was then specifically asked if he wanted an attorney present at that time and the Respondent stated, "No." (WHT 41). Wheeler testified that when the Respondent mentioned that he had asked for court appointed counsel Wheeler asked Respondent if he wanted an attorney present, to which Respondent replied, "I do not need one." (WHT 43). Lieutenant Lowe testified to this recollection of the events:

> Mr. Bladel at this time stated that he had requested an attorney at his arraignment, but he hadn't seen him, seen the attorney yet, that he would talk to us, and he said he would talk to us, and he said he didn't need his attorney there while he was talking to us. (WHT 47).

• • •

> Q: Was there any mention of an attorney at this time?
>
> A: I asked him if he desired his attorney present and he stated he did not need one.
>
> Q: What, if anything, further took place then?
>
> A: In addition to the last statement that Mr. Bladel said, when I asked him if he needed his attorney present he stated, 'I don't need him present. I'm going to plead guilty anyway.' (WHT 54).

During this interview, Respondent confessed to the three murders.

Respondent did not have any contact with his attorney until the day after his confession. (WHT 67-68). In addition to the times he was advised of his rights in connection with this case, Respondent had been advised of his rights previously and was aware of his rights from this past experience. (WHT 71).

History of Raising of Federal Questions

Respondent preserved his challenge to the constitutionality of the confession by way of a pre-trial "Motion to Suppress or in the Alternative for a Walker* Hearing." The hearing was granted and held on July 5, 1979. After hearing the testimony at the *Walker* hearing, the trial court found the confession admissible:

> Now I understand the position of the Defendant to the effect that he did demand counsel on March 23 at his arraignment in District Court. Now, whether or not counsel was appointed by March 26, incidently March 23, 1979 was a Friday and March 26, 1979 was a Monday, and, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does effect the voluntariness and the effectiveness of the waiver of the rights.
>
> Now, I don't know of any case why (sic) counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant that he should not say anything without the presence of counsel. But, there is no case that I know of that says *Miranda* goes that far so the holding is that the testimony or the substance of the statements of all three occasions and the confessions will be admissible. (WHT 108-109). (Appendix B, *infra*).

The constitutional question was raised in Respondent's appeal of right to the Michigan Court of Appeals, which affirmed following the reasoning of the Fifth Circuit cases of *Nash* v. *Estelle,* 597 F2d 513 (5th Cir. 1979) and *Blasingame* v. *Estelle,* 604 F2d 893 (5th Cir. 1979). *People* v. *Bladel,* 106 Mich. App. 397; 308 NW2d 230 (1981). The Michigan Supreme Court, in lieu of granting Respondent's Application for Leave to Appeal, remanded to the Court of

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* *People* v. *Walker,* 374 Mich. 331 (1965), see motion, Appendix C, *infra.*

Appeals for reconsideration in light of *People* v. *Paintman* and *People* v. *Conklin,* 412 Mich. 518; 315 NW2d 418 (1982), decided in the interim, which adopted this Court's holding in *Edwards* v. *Arizona, infra. People* v. *Bladel,* 413 Mich. 864; 317 NW2d 855 (1982). On remand, the Court of Appeals summarily reversed concluding that *Paintman* and *Conklin, supra,* read in light of the remand order "compelled" reversal. *People* v. *Bladel,* 118 Mich. App. 498; 325 NW2d 421 (1982).

The Michigan Supreme Court granted Petitioners Application for Leave to Appeal on the issue that the confession in the instant case was not taken in violation of Respondent's Fifth Amendment rights. The Michigan Supreme Court agreed that Respondent's Fifth Amendment rights were not violated, but held that Respondent's Sixth Amendment rights were violated by police-initiated interrogation after Respondent had requested court appointed counsel at his initial arraignment. *People* v. *Bladel* slip opinion Appendix A p. 18. The Court concluded that the Sixth Amendment precludes further police-initiated interrogation after a request for counsel is made to a judicial officer by "analogy" to this Court's case of *Edwards* v. *Arizona, infra,* which requires such preclusion under the Fifth Amendment where the defendant requests counsel during custodial interrogation.

REASONS FOR GRANTING THE WRIT

1. Conflicting decisions by both Federal and State courts require this Court's resolution of the questions presented by Petitioner.

It is imperative that this Court address the issues raised in this Petition. The issues are ones of substantial questions of Federal Constitutional Law. Lower State and Federal courts have reached differing, and in some cases diametrically opposed results. A final, authoritative ruling is needed. (See Appendix A, page 41).

This Court has not previously addressed the specific issues raised in this Petition. Only this Court has the authority to render a conclusive and binding decision as final arbiter of the United States Constitution. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat) 316 (1819).

Essentially, the holdings of the Michigan Supreme Court in this case are that (1) a request at District Court arraignment for the appointment of counsel is an invocation by Defendant of his Sixth Amendment right to counsel, and that (2) the Sixth Amendment requires a "bright line" rule prohibiting police initiated interrogation after Defendant has invoked his Sixth Amendment right to counsel at District Court arraignment. The Michigan Supreme Court's holding that a request for counsel at arraignment prevents further police initiated interrogation is the first such decision according to Petitioner's research. This analogous extension of the rule of *Edwards* v. *Arizona,* 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981), is contrary to the holdings of other cases.

The recent Georgia Supreme Court case of *Ross* v. *State,* 36 CrL 2413 (3-6-85) dealt with the same issues presented in the instant case. There, Defendant Ross had spoken with police on several occasions. Two days after his last statement to police, Ross made his "first appearance" before a Magistrate. This appearance was in a non-adversarial setting and therefore the Georgia Supreme Court concluded that the Sixth Amendment right to counsel had not attached, relying on this Court's case of *United States* v. *Gouveia,* —— US ——, 104 SCt 2292, 81 LEd2d 146 (1984). At that initial appearance, Defendant Ross declined the appointment of counsel but asked for additional time within which to retain his own counsel. The Georgia Supreme Court, in responding to Defendant Ross's Fifth Amendment claim, ruled as Petitioner contended in the Michigan Supreme Court, that in light of the fact that the defendant had never requested counsel

while being interrogated by police nor did he request that interrogation cease for any reason and defendant did not at this first appearance indicate an intention not to deal with police except through counsel, *Edwards* v. *Arizona* is not applicable. Under the circumstances of the *Ross* case, voluntariness of the confession must be determined under *North Carolina* v. *Butler,* 441 US 369; 99 SCt 1755; 60 LEd2d 286 (1979) rather than under the per se rule of *Edwards* v. *Arizona.* The Georgia Supreme Court's holdings are in conflict with the instant case.

In *Johnson* v. *Commonwealth,* 255 SE2d 525 (VA 1979), the Virginia Supreme Court reaffirmed its prior holding that "police may question an accused who has counsel, retained or appointed, whether or not the attorney is present." *Johnson, supra,* 255 SE2d at 531. The *Johnson* facts are on all fours with the case at bar. Johnson was arrested, advised of his rights, waived those rights and spoke with police. The following day Johnson was arraigned, claimed indigency, requested and was granted court appointed counsel. After arraignment, an officer, unaware of request for counsel at arraignment, interviewed defendant after advice and waiver of Miranda rights. The Virginia Supreme Court concluded that, under these facts, Johnson's ability to exercise his right to counsel was scrupulously honored under *Michigan* v. *Mosley,* 423 US 96; 96 SCt 321; 46 LEd2d 313 (1975) and therefore the confession was properly admitted.

The Fifth Circuit addressed this issue in several cases including *Jordan* v. *Watkins,* 681 F2d 1067 (CA 5, 1982). In *Jordan,* defendant had been appointed counsel before he confessed during police initiated interrogation. The court found *Edwards* inapplicable. *Edwards* was interpreted as prohibiting police conduct which "impinged on the exercise of the suspect's continuing right to cut-off interrogation." *Jordan, supra,* 681 F2d at 1073, quoting from *Blasingame* v. *Estelle,* 604 F2d 893 (Fifth Circuit

1979). The *Jordan* Court rejected defendant's Fifth and Sixth Amendment challenges, finding defendant's experience and advice and waiver of Miranda rights sufficient for a knowing, intelligent and voluntary waiver of Fifth and Sixth Amendment rights to the presence of counsel.

Several other cases have dealt with the implications of police-initiated interrogation after a request for counsel at arraignment. These cases address the direct holdings of the Michigan Supreme Court and the implicit holding that Miranda warnings are inadequate for establishing a knowing, intelligent and voluntary waiver of the Sixth Amendment right to the presence of counsel during interrogation. Petitioner requests that this Court review the implicit holding as well as the explicit holdings of the Michigan Supreme Court so that a complete resolution of the case made be had. (Many of the cases which have ruled on the relevant issues are capsulized in Appendix D.)

2. The Michigan Supreme Court, in deciding that the Sixth Amendment required, by analogy to *Edwards* v. *Arizona*, that police be prohibited from initiating interrogation after a defendant has requested counsel at arraignment, ruled inconsistently with prior decisions of this Court and this Court would probably decide the issues presented differently.

Despite the Michigan Supreme Court's accurate understanding that a request for counsel at arraignment does not have Fifth Amendment implications, that court nonetheless applied the rule of this Court's Fifth Amendment case of *Edwards* v. *Arizona,* 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981). Rather than being an analogous application of the *Edwards* rationale, the Michigan Supreme Court directly applied the result of *Edwards* to an analytically distinct circumstance, resulting in a perversion rather than a progression of the *Edwards* rationale.

This Court limited its analysis of *Edwards* to the Fifth Amendment. *Edwards* v. *Arizona, supra,* 451 US at 480 n.7; 101 SCt at 1883 n.7. The Michigan Supreme Court, however, found the analysis of the instant case to be confined to the Sixth Amendment. (See Appendix A, page 11a). The Fifth and Sixth Amendment rights are separate and distinct requiring different analyses. *Rhode Island* v. *Ennis,* 446 US 291, 300 note 4; 100 SCt 1682, 1689 note 4; 64 LEd2d 297 (1980). Rather than applying the reasoning of *Edwards* by analogy, the Michigan Supreme Court merely adopted the identical rule of *Edwards* in this distinct Sixth Amendment setting. For such a direct adoption of the rule under the Fifth Amendment to be appropriate in this Sixth Amendment case, the circumstances of the invocation of the Sixth Amendment right must be the same as the invocation of the Fifth Amendment right and the interest protected by both rights must also be identical.

The progression of a logical analysis of this case must begin with the underlying principles and protections afforded by the Fifth Amendment, followed by a close examination of how *Edwards* v. *Arizona* protects those Fifth Amendment rights and then an examination of the Sixth Amendment followed by application of *Edwards* to the Sixth Amendment setting to see if the Fifth Amendment remedy is appropriate in this Sixth Amendment case.

The Fifth Amendment right to counsel is a narrow one. It is the right to "confer with or have counsel present before answering any questions" during custodial interrogation. *Blasingame* v. *Estelle,* 604 F2d 893, 896 (CA 5) (1979). The Fifth Amendment right to counsel was fully developed by this Court in *Miranda* v. *Arizona,* 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966). The *Miranda* case essentially applied the principles which formed the basis for the Fifth Amendment right against compelled testimony (belief that compelled testimony is inherently unreliable and that Star Chamber style compulsion of a

defendant to give evidence which "makes" the state's case against the individual offends our sense of justice) to the setting of custodial interrogation with its presumed inherent, psychological compulsion. *Oregon* v. *Elstad,* —— US ——; 53 LW 4244, 4247 (3-5-85). The *Miranda* court ruled that custodial interrogation could only produce voluntary statements when the confessor has knowingly and intelligently waived his expanded Fifth Amendment rights. The Court found essential to the protection of these rights, the right to the presence of an attorney during custodial interrogation. However, the right to counsel can also be waived. The *Johnson* v. *Zerbst,* 303 US 458; 58 SCt 1019; 82 LEd 1461 (1937) standard is presumptively met by advise and waiver of "Miranda warnings." The Fifth Amendment right to counsel protects defendants in the exercise of their right to remain silent assuring that any statements are not obtained through coercion or trickery. *Berkemer* v. *McCarty,* —— US ——; 104 SCt 3138, 3150 n.27; 82 LEd2d 317 (1984).

In light of the narrow scope of the Fifth Amendment right to counsel, an assertion of that right by a criminal defendant is equally narrow. When a defendant requests counsel during custodial interrogation, it is clearly the defendant's will not to speak to police without the presence of counsel. The invocation of the Fifth Amendment right to counsel is no less and no more than precisely that.

The narrow scope of the Fifth Amendment right to counsel is the key to a right understanding of *Edwards* v. *Arizona, supra.* In *Edwards,* the defendant made a request for counsel to police during interrogation. *Edwards, supra,* 451 US at 479; 101 SCt at 1882. The next morning, a guard came to Edwards' cell to inform him of the detectives' desire to talk to him. Edwards replied that he did not want to talk, but the guard told him that he had to. *Edwards, id.* The guard took Edwards to meet with the detectives. Edwards was advised of his "Miranda

rights," which he waived, then Edwards confessed. *Edwards, id.*

Mr. Justice White's Opinion in *Edwards* focused on what constitutes a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards, supra,* 451 US at 482; 101 SCt at 1884. A defendant cannot, in the legal sense of voluntariness, waive his right to counsel unless he knows and fully understands that right. Police conduct in the *Edwards* case brought into question whether the relinquishment of the right to counsel was knowing and intelligent. The effect of the Miranda Rule is to make the police the legal advisor of a defendant in the initial phase of custodial interrogation. Thus, Edwards was depending on the police as the source of his knowledge of his legal rights. Edwards certainly could have been confused as to what his rights were because of inconsistent police conduct.

The initial cessation of interrogation upon Edwards' request for counsel would indicate to Edwards that the right to the presence of counsel truly did exist and that the police would honor that right. However, the later reinterrogation (especially in light of the comment of the jailer that Edwards must talk) was at least an implicit statement by the police that defendant did not have the right to the presence of counsel at interrogation or at the very least that they would not honor that right if it existed. This inconsistent police conduct could bring confusion into the defendant's mind precluding a knowing and intelligent waiver.

Additionally, the waiver in *Edwards* is drawn into question because police initiated reinterrogation is a request by police that the defendant abandon in its totality the very specific and narrow right to the presence of counsel that the defendant had previously invoked. Inconsistent behavior is asked of the defendant. Thus, the voluntari-

ness of this confession is called into question because any change of mind by defendant has come at the behest of the police. Police initiated interrogation after a defendant's request for counsel, violates the rule of Miranda that if an accused requests the presence of counsel, "the interrogation must cease until an attorney is present." *Miranda, supra,* 384 US 474; 86 SCt 1627. Reinterrogation in these circumstances directly impinges upon the defendant's Fifth Amendment right to the presence of counsel as established in Miranda. As recognized by this Court in Edwards, the request made by Edwards "expressed his desire to deal with the police only through counsel..." *Edwards, supra,* 451 US 486; 101 SCt 1885. The reappearance of police without the presence of counsel, impinged on that right. Police initiated interrogation after the invocation of the Sixth Amendment right to counsel by request for court appointed counsel at arraignment does not so impinge on a defendant's rights.

The scope of the Sixth Amendment right to counsel is very different from that of the Fifth Amendment right to counsel. The Sixth Amendment right to counsel is the right to have an attorney appointed to represent the defendant through the judicial proceedings once they have reached a critical state. *Brewer* v. *Williams,* 430 US 387, 398; 51 LEd2d 424; 97 SCt 1232, 1239 (1977). *United States* v. *Gouveia,* —— US ——; 104 SCt at 2292 (1984). The Sixth Amendment right to counsel extends both to the courtroom and to those critical stages of the judicial process where the assistance of counsel is needful for the protection of defendant's later rights. See *United States* v. *Wade,* 388 US 218; 87 SCt 1926; 18 LEd2d 1149 (1967). It is within this broad scope of the Sixth Amendment right to counsel that there becomes overlap with the Fifth Amendment right to counsel. The Fifth Amendment right to counsel extends to all custodial interrogation whether before or after the judicial process has reached a critical

stage. The Sixth Amendment right to counsel includes the right to the presence of counsel during "post-indictment communications between the accused and agents of the government" whether or not the defendant is in custody at the time of the interrogation. *United States* v. *Henry,* 447 US 264; 100 SCt 2183; 65 LEd2d 115 (1980).

It appears that the appropriate questions to be posed, in order to determine the validity of the Michigan Supreme Court's analogous application of *Edwards* to an assertion of Sixth Amendment right to counsel, is whether a general request for counsel in the exercise of a defendant's Sixth Amendment rights necessarily indicates a desire by the defendant to deal with the police only through counsel as in *Edwards* such that subsequent police initiated interrogation both negates the defendant's knowledge and understanding of his right to counsel and is, in effect, a request that the defendant act inconsistently with his request for counsel at arraignment. Numerous cases have dealt with these questions and many have concluded that a general request for counsel at arraignment is not such that it effectively exercises a right to preclude subsequent interrogation.

The facts of the Fifth Circuit case of *Nash* v. *Estelle,* 597 F2d 513 (Fifth Circuit 1979) are very helpful in seeing a circumstance in which a defendant clearly articulates both a desire to have counsel represent him during the judicial process and also to speak with the authorities without the presence of counsel. The following is an excerpt from an interview by an Assistant Prosecutor six days after Nash was arrested on a murder charge: (Prosecutor Files)

> Files: You want one to be appointed for you?
>
> Nash: Yes, sir.
>
> Files: OK. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh, I kinda, you know, wanted, you know to talk about it, you know, to kinda you know, try to get it straightened out.

Files: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

Nash: I would like to have a lawyer, but I'd rather talk to you.

Files: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

Nash: No, I would rather talk to you.

Files: You would rather talk to me? You do not want to have a lawyer here right now?

Nash: No, sir.

Files: You are absolutely certain of that?

Nash: Yes, sir. (Nash, *supra,* at 516-517).

The subsequent taped confession was found to be admissible on the basis that it was permissible for defendant to unburden himself by confessing to his custodians, *Nash,* at 517, while still maintaining his right to be represented during judicial proceedings. This Court's decision in *Smith* v. *Illinois,* 469 US ——, 105 SCt 490; 83 LEd2d 488 (1984) calls into question the admissibility of this statement because of the rather clear request for counsel initially made. Nonetheless, this case remains illustrative of an individual's desire to speak directly with police while maintaining the remainder of the incidents of the right to counsel.

The Fifth Circuit applied the *Nash* reasoning in a case with facts strikingly similar to those in the instant case.

In *Blasingame* v. *Estelle,* 604 F2d 893 (CA 5) (1979), Defendant Blasingame was arrested late at night and arraigned the following morning. At that arraignment, he was advised of his right to counsel and filled out a form requesting a court appointed attorney. That night, a Dallas police officer interviewed Blasingame after having advised Blasingame of his Miranda rights which Blasingame knowingly and intelligently and voluntarily waived. On appeal, Blasingame asserted that a Fifth Circuit predecessor of *Edwards* v. *Arizona* precluded questioning after his unequivocal request for counsel at arraignment. The *Blasingame* court saw the issue this way:

> In evaluating this argument, the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.'
>
> *Nash* v. *Estelle,* 597 F2d 513, 518 (CA 5) (1979). (Blasingame at 895).

The *Blasingame* court found that the right to counsel asserted by the defendant was not one that precluded later police initiated interrogation and thus the rights asserted at arraignment were not impinged by the later inquiry. The *Blasingame* court said "Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present." (*Blasingame, supra,* at 895-896). After noting that the assertion of the right to counsel at arraignment was unrelated to his Fifth Amendment right to confer or have counsel present during custodial interrogation, the *Blasingame* court held that:

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent stationhouse interrogation where the request at arraignment is not made in such a way as to effectively exercise

the right to preclude any subsequent interrogation. (*Blasingame, supra,* at 896)[1]

Nash and *Blasingame* like *Jordan, supra* and *Johnson* v. *Commonwealth, supra,* found that there was so little connection between the request for counsel at arraignment in exercise of the Sixth Amendment right to counsel and subsequent interrogation, that subsequent interrogation does not impinge on the right previously exercised. The Virginia Supreme Court in *Johnson* v. *Commonwealth, supra,* looked for guidance in this court's case of *Michigan* v. *Mosley,* 423 US 96; 96 SCt 321; 46 LEd2d 313 (1975). *Michigan* v. *Mosley,* provides far more guidance for the determination of whether the defendant's rights were violated in the instant case than does *Edwards* v. *Arizona,* due to the tremendous contrast between the *Edwards* situation and that in the instant case.

In *Michigan* v. *Mosley, supra,* the defendant was arrested on a number of robbery charges. A Detective Cowie interviewed the defendant about the robberies. During that interrogation, defendant Mosley exercised his right to remain silent, rather than his right to the presence of counsel. Two hours later, Detective Hill initiated interrogation of Mosley in reference to an unrelated homicide. The second interrogation began with advice and waiver of Miranda rights. On appeal, Mosley claimed that his assertion of the right to remain silent, made to Detective Cowie, precluded further police initiated interrogation. This court found that Mosley's rights had not been violated.

---

[1] There are a number of cases which, though not without their problems in regard to the clarity of the rule therein applied, arguably involve circumstances where the request at arraignment has a close nexus to an invocation of right to the presence of counsel during interrogation. These cases are generally ones where the request for counsel follows the arraigning Magistrate's recitation of Miranda warnings. (e.g., Silva v. Estelle, 672 F2d 457 (CA 5, 1982).

The focus of this court's decision in *Mosley* was whether the defendant's " 'right to cut off questioning' was fully respected in this case." *Michigan* v. *Mosley,* 423 US 103; 96 SCt 327. The court found that the defendant's rights were fully respected. *Miranda* did not state when interrogation could be resumed after an exercise of the right to remain silent. This court refused to hold that an exercise of the right to remain silent precludes all further interrogation. Neither would this court allow reinterrogation after a momentary pause. *Mosley, supra,* 423 US 107; 96 SCt 328. Thus, *Mosley* added to Miranda the rule that the right to remain silent prevents further police initiated interrogation until there has been a significant period during which the questioning has been suspended.

Another aspect of the reasoning in *Mosley* is that the defendant's exercise of his right to remain silent made during questioning by Detective Cowie was, at the most, ambiguous as to whether Mosely was desirous of talking about any other crimes. The court noted that in these circumstances, questioning on an unrelated crime was "quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies." *Mosley,* 423 US at 105; 96 SCt at 327. The advice of Miranda rights before the second interrogation gave the defendant a full and fair opportunity to once again invoke his right to remain silent. The subsequent advice of rights, though placing a minor burden on the defendant of having to once again assert his right to remain silent if that was his desire, was heavily outweighed by the beneficial value of resolving any ambiguity in the defendant's previous invocation of his right to remain silent. The facts and reasoning of *Mosley* are far more in accord with the instant case than is *Edwards* v. *Arizona.*

In the instant case, Respondent's request for counsel at arraignment does not necessarily indicate that defendant desires to only deal with police through counsel, the clear

indication by the defendant in *Edwards*. Thus, subsequent questioning by the police was "quite consistent" with Respondent's previous request for counsel. Since the individuals who interrogated Respondent did not have previous contact with Respondent, their actions of reinitiating interrogation were not inconsistent with any previous statements that they had made; thus, defendant could not reasonably believe that his rights would not, in fact, be honored. The burden placed on Respondent in the instant case is no greater than that placed on Mosley. Mosley could have protected himself from the subsequent interrogation by restating his desire to remain silent. In the instant case, defendant was readvised of Miranda rights and the interviewing detectives gave a full and fair opportunity for defendant to exercise his right to the presence of counsel. Defendant refused to do so. The great benefit in resolving the ambiguity of defendant's request for counsel at arraignment far outweighed any burden placed on defendant by requesting him to make the simple statement when advised of his Miranda rights that he does not want to talk without counsel. In the circumstances of the instant case, Respondent's Sixth Amendment rights were scrupulously honored. The waiver of his right to the presence of counsel during interrogation was knowingly, intelligently and voluntarily made. The Michigan Supreme Court erred in ruling that admission of Respondent's confession was reversible error.

The argument stated here is in accord with the reasoning of the Georgia Supreme Court in *Ross* v. *State, supra.* In *Ross,* the defendant had repeatedly spoken with police officers without requesting the presence of counsel. This is the same behavior as that of Respondent in the instant case. The Georgia Supreme Court, while recognizing that a defendant need not state preciously why he wants an attorney that if he does request an attorney, "surely from the circumstances of such a request we can find guidance

as to the accused's state of mind, which is the key voluntariness inquiry." *Ross* v. *State, supra,* 36 CL 2413. Quoting from *Collins* v. *Francis,* 728 F2d 1322, 1333-1334 (Eleventh Circuit 1984). In the circumstances of this case, it is clear that the accused's state of mind was such that he only wanted counsel to represent him during the judicial proceeding and not during custodial interrogation.

The general request for appointment of counsel in exercise of Sixth Amendment rights at arraignment is so different from the narrow and specific request for the presence of counsel during custodial interrogation under the Fifth Amendment that an analogous application of the rules of *Edwards* v. *Arizona* is totally inappropriate in this Sixth Amendment case. The Michigan Supreme Court's Sixth Amendment ruling is not required by the prior cases of this court, is contrary to the prior cases of this court and is contrary to the way that this court would decide this case were it to grant plenary review.

Even if this Court's prior cases support an analogous Sixth Amendment rule to the Fifth Amendment rule of *Edwards,* the Michigan Supreme Court's rule is not it. This Court has pursued a steady course of balancing the rights of criminal defendant's against the interests of justice over the last several years. Perhaps the most helpful aspect of this course has been the establishment of "bright line" rules to guide the conduct of police. The importance of "bright line" rules was emphasized recently in *Berkemer* v. *McCarty, supra.* In *Berkemer,* this Court ruled that Miranda rights must be given at the point of custody determined by an objective test. This rule establishes a bright line consistent with *Miranda* and *Edwards.* Common to all the "bright line" decisions of this Court is that the police officer, whose conduct is controlled by the rule, is present and able to ascertain from the events he witnesses what course of action he can take without

violating the defendant's constitutional rights. In *Edwards,* the request for counsel is made directly to police during interrogation. The request *to police* is the event that precludes further police interrogation. The rule created herein by the Michigan Supreme Court is inapposite. The request herein was made *to a judicial officer,* in circumstances where police are not necessarily present, yet the Michigan Supreme Court would have the request control *police* conduct. Such a rule obscures rather than clarifies. The police are not always privy to the facts upon which they must base their actions. This is no "bright line," it is a "black hole."

Confessions, voluntarily made, are relevant and probative evidence. This Court said in *Oregon* v. *Elstad, supra,* "voluntary statements 'remain a proper element of law enforcement.' *Miranda* v. *Arizona,* 384 U.S. at 478. 'Indeed, far from being prohibited by the constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . .' " *Oregon* v. *Elstad,* 53 Law Week at 4246. The Michigan Supreme Court's rule would result in suppression of relevant evidence where the constable has not even bungled. The rule cannot stand.

3. Necessary to the resolution of the issues raised in this Petition, is for this Court to determine whether the substance of the rights contained in standard Miranda warnings are adequate to constitute a waiver of both Sixth Amendment and Fifth Amendment rights to the presence of counsel during interrogation.

The Michigan Supreme Court has held that once the Sixth Amendment right to counsel has attached, the defendant may choose to reinitiate communication with the police, but before a confession will be admissible even where defendant has initiated a communication, the defendant must be sufficiently advised of both his Fifth and

Sixth Amendment rights so as to "effecuate a voluntary, knowing, and intelligent waiver of each right." *Bladel* at 18. The Michigan Supreme Court was not so kind as to inform police and prosecutors as to the nature of the Sixth Amendment rights waived during interrogation. The Michigan Supreme Court discussed without deciding the split of authority over whether the content of Miranda warnings are sufficient to waive the Sixth Amendment right to counsel. Petitioner submits that the content of the Miranda warnings are adequate to provide a basis for knowing, intelligent and voluntary waiver of the Sixth Amendment right to the presence of counsel at post-arraignment interrogation.

As noted above, the Miranda right to the presence of counsel during custodial interrogation is a means of protecting the defendant in the exercise of his Fifth Amendment rights. This court has noted in *Berkemer* v. *McCarty,* —— US ——, 104 SCt 3138, 3150, note 27, 82 LEd2d 317 (1984) that one of the purposes of the Miranda rule is to protect the defendant from confessions elicited through trickery. The pre-trial Sixth Amendment right to counsel is intended to preserve the defendant's "basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *United States* v. *Wade, supra,* 388 US at 227; 87 SCt at 1932. It would appear that the Fifth and Sixth Amendment rights in this narrow area of overlap are identical. Both extend the right to counsel for the purpose of protecting in all ways the rights of the criminal defendant as they arise in the context of custodial interrogation. More specifically, the Fifth Amendment right, as articulated in *Miranda,* is the right to the presence of counsel during custodial interrogation. The Sixth Amendment right, as articulated in *United States* v. *Henry, supra,* 447 US at 269; 100 SCt at 2186, is the right to have counsel present during post-indictment

communications. In the instant case, the post-arraignment communications were in the context of custodial interrogation. Being post-arraignment, there is no doubt in the Defendant's mind that he has been charged with a crime and what that crime is. His only right under either the Fifth or Sixth Amendment is to the presence of counsel. The Miranda warnings so advised Respondent. In the instant case, Respondent was informed of the full scope of his rights in regard to counsel during these communications which right is to the presence of counsel. Respondent specifically waived that right and therefore in the context of the instant case, Miranda warnings clearly suffice for a knowing, intelligent and voluntary waiver of both Respondent's Fifth and Sixth Amendment rights to counsel.

The argument above is in accord with the case of *United States* v. *Karr,* 742 F2d 493, (Ninth Circuit 1984). The *Karr* court noted that the Sixth Amendment right to counsel is analytically distinct from the Fifth Amendment right to counsel. *Karr* at 495. However, after reviewing a number of cases on this point, the court concluded that Miranda warnings were sufficient to constitute a waiver of Sixth Amendment rights to counsel. *Karr* at 496. In *Karr,* the defendant was aware that formal judicial proceedings had begun, was given Miranda warnings and waived those before confessing. The court concluded that this was a valid waiver of the defendant's Sixth Amendment rights.

Petitioner requests that this Court address this issue and decide in Petitioner's favor so that a full resolution of this case may be had without the necessity of a return to this Court for clarification of this question.

CONCLUSION

There is a tremendous conflict both in State and Federal courts regarding the effect of this Court's rule in *Edwards* v. *Arizona* in the Sixth Amendment context. This conflict includes both questions as to whether police initiated interrogation can properly follow a request for counsel at arraignment and whether standard Miranda warnings would suffice as a basis for a knowing, intelligent and voluntary waiver of Sixth Amendment rights. In addressing the first of these issues, the Michigan Supreme Court ignored the reasoning of *Edwards* and directly applied the *Edwards* result in an analytically distinct case. This Court would most likely decide the issues presented differently than they were decided by the Michigan Supreme Court. In light of the errors by the Michigan Supreme Court and the conflict which can only be resolved by this Court, Petitioner respectfully prays that this Court will issue a Writ of Certiorari to the Michigan Supreme Court in the instant case.

Respectfully submitted,

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Counsel for Petitioner

Dated: March 29, 1985

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Ronald J. Bretz, Assistant Defender, State Appellate Defender's Office, 720 Plaza Center, 125 W. Michigan Avenue, Lansing, Michigan 48193 and Rudy Bladel, #158760, Marquette Branch Prison, P.O. Box 779, Marquette, Michigan 49855 by an agent of Byron S. Adams, by depositing same in the United States mail this ____ day of March, 1985 postage prepaid.

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APPENDICES

APPENDIX A

SUPREME COURT OPINION

SUPREME COURT
Lansing, Michigan
48909

January 29, 1985

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Re: People v Bladel, No. 69749
People v Jackson, No. 69615

To All Attorneys of Record:

Due to editorial work necessary to prepare the enclosed opinion for release, release on the date of decision was not possible. Therefore, by direction of the Court, this is to advise you that, notwithstanding the provisions of GCR 1963, 864.4, the 20-day period for moving for rehearing commences on the date the opinion is released to the parties. In this case, that date is January 29, 1985.

Very truly yours,

SUPREME COURT CLERK

CRD/kle
Enclosure

7-8/April 1984

STATE OF MICHIGAN
SUPREME COURT

Released January 29, 1985

No. 69749

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellant,*

v

RUDY BLADEL, *Defendant-Appellee.*

No. 69615

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*

v

ROBERT BERNARD JACKSON, *Defendant-Appellant.*

[Filed Dec 28 1984]

BEFORE THE ENTIRE BENCH

M. F. CAVANAGH, J.

The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in *Edwards* v *Arizona,* 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and *People* v *Paintman,* 412 Mich 518; 315 NW2d 418 (1982), *cert den* 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982).

I

A

Defendant Bladel was convicted by a jury in July, 1979, of three counts of first-degree premeditated murder.[1] He

[1] MCL 750.316; MSA 28.548.

was sentenced to three concurrent mandatory life sentences. Testimony at trial revealed that three railroad employees were shot to death on December 31, 1978, at the Amtrak station in Jackson, Michigan. Defendant, a disgruntled former railroad employee, was the prime suspect.[2] He was arrested on January 1, 1979, and questioned twice by Detective Gerald Rand on January 1 and 2. Defendant was properly advised of his *Miranda*[3] rights before each questioning and agreed both times to talk without an attorney. Defendant admitted being in and around the station on December 30 and 31, 1978, but denied any involvement in the killings. He was released on January 3.

On March 18, 1979, the shotgun used in the killings was found. The weapon had been purchased by defendant two

[2] The evidence against defendant was substantial. Shortly before he died, one of the victims indicated that the assailant was a white male. A ticket clerk observed a tall, husky person walking away from the station after the shootings, carrying a soft-sided suitcase. A passerby similarly testified that he observed a stocky man wearing a jacket and cap walking away from the station carrying a case. He entered a nearby hotel. Defendant had rented a room at that hotel on December 30 and 31, 1978.

When defendant was arrested on January 1, 1979, he was wearing a blue nylon jacket and cap and was carrying a brown soft-sided suitcase, which contained a can of gun oil. Defendant first claimed that he had been nowhere near the station, but later stated that he had used the restrooms there twice. He claimed to have recently arrived in Jackson to look for a job, even though it was a holiday weekend.

A 12-gauge shotgun and duck jacket were found in mid-March 1979. Ballistics evidence disclosed that a spent shotgun shell found at the scene of the killings came from the shotgun. The weapon had been purchased by defendant in Elkhart, Indiana, two years before the killings. Fibers found on the gun and the duck jacket and in defendant's suitcase were identical. A speck of human blood was also found on the cap defendant was wearing when he was first arrested.

[3] *Miranda* v *Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

7-8/April 1984

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SUPREME COURT

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[3] *Miranda* v *Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

years before the killings. The police also obtained strong scientific evidence linking him to the killings. Defendant was arrested in Elkhart, Indiana, on March 22, 1979. He waived extradition after being advised by a magistrate of his right to a full hearing and representation by counsel.

Defendant was driven back to Jackson the same afternoon. Detective Rand questioned him again that evening. Prior to questioning, defendant was properly advised of his rights, agreed to talk without counsel, and signed a waiver form. He did not confess to the killings.

Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Rand. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times.

On March 26, 1979, two police officers interviewed defendant in the county jail. Although the officers were working with Detective Rand on this case, they were not told that defendant had requested counsel. Prior to questioning, the defendant was again properly advised of his *Miranda* rights. When he informed the officers that he had requested counsel, they inquired whether he wished to have an attorney present during questioning. Defendant agreed to proceed without counsel, signed a waiver form, and subsequently confessed to the killings.

Defendant challenged the admissibility of the confession and the three exculpatory statements at a pretrial *Walker*[4] hearing. The trial court ruled that all of the statements were admissible because defendant was properly advised

[4] *People* v *Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

of his rights and had knowingly and understandingly waived them each time.[5]

On appeal, defendant challenged only the admissibility of the confession. The Court of Appeals upheld the trial court's decision and affirmed the convictions.[6] *People* v *Bladel*, 106 Mich App 397; 308 NW2d 230 (1981). In lieu of granting leave to appeal, this Court remanded to the Court of Appeals for reconsideration in light of *People* v *Paintman* and *People* v *Conklin*, 412 Mich 518; 315 NW2d 418 (1982). On remand, the Court of Appeals summarily concluded that *Paintman* and *Conklin*, when read in conjunction with this Court's remand order, "compelled" reversal. 118 Mich App 498; 325 NW2d 421 (1982). We granted the prosecutor's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

B

Defendant Jackson was charged with first-degree murder, conspiracy to commit first-degree murder,[7] and pos-

[5] The court acknowledged that the lack of opportunity to consult with counsel before interrogation does affect the voluntariness and effectiveness of a waiver. However, it knew of no case which required suppression under these circumstances.

[6] The Court of Appeals rejected defendant's assertion that interrogation can never occur once a defendant requests counsel. The court acknowledged that the prosecutor bore a heavy burden in proving a knowledgeable and voluntary waiver and that the police may have acted unethically in obtaining the confession. Nevertheless, the waiver was valid because defendant had been warned by the Indiana magistrate not to talk to police until he met with counsel, he had prior contact with the criminal justice system and understood his rights, he had signed a waiver form, and had not reasserted his right to counsel during the interrogation. Finally, the four-day delay between arraignment and the first meeting with counsel was not unreasonable. There was no evidence that defendant was kept from his attorney in order to obtain a confession.

[7] MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548.

session of a firearm during the commission of a felony[8] in connection with the death of Rothbe Elwood Perry. He was convicted by a jury in February, 1980, of second-degree murder[9] and conspiracy to commit second-degree murder. He was sentenced to two concurrent life terms.

Mr. Perry was shot and killed in his home in Livonia, Michigan, on July 12, 1979, during an apparent robbery. On July 28, 1979, Mildred Perry (the deceased's wife) and Charles (Chare) Knight were arrested for the murder. Knight subsequently told Livonia police that Mildred Perry had solicited him to kill her husband. He, in turn, had contacted defendant. Knight maintained that defendant and another man had broken into the house and shot the deceased.

Defendant and Michael White were arrested on Monday, July 30, 1979, by Detroit police on an unrelated charge. They were turned over to the Livonia police at approximately 2 p.m. the following day. Defendant was questioned several times on July 31 and gave three similar statements.[10] Defendant admitted breaking into the house to

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[8] MCL 750.227b; MSA 28.424(2).

[9] MCL 750.317; MSA 28.549.

[10] Defendant's first oral statement was given at 3.30 p.m. A similar statement was tape recorded at 5:52 p.m., but was retaped at 8:48 p.m. because of the poor quality of the prior recording. Defendant maintained that he was not advised of his *Miranda* rights until shortly before the first taping and that he had requested an attorney during the first interrogation. He agreed to confess because the police suggested that he might be able to plead to less than first-degree murder. He was also afraid that he would be beaten.

In contrast, several police officers testified that defendant was advised of his rights as he was being transported from Detroit to Livonia and before each statement was given. They denied that defendant had ever requested an attorney. They also denied promising him a "deal" or threatening him. The trial court found the police officers' testimony to be more credible.

kill Mr. Perry, but maintained that Knight had fired the shots.

On August 1, at approximately 10 a.m., defendant submitted to a polygraph examination after being advised of his *Miranda* rights. When defendant was informed that he had not passed, he told the examiner that he was the shooter and White had accompanied him. Defendant gave substantially similar oral and written statements shortly thereafter to Sergeant William Hoff, one of the officers in charge of the case.[11]

Defendant, White, Perry, and Knight were arraigned at 4:30 p.m. that afternoon. During arraignment, defendant requested that counsel be appointed for him. Sergeants Hoff and Shirley Garrison were present when defendant requested counsel.

At 10:24 a.m. the next morning, defendant was readvised of his rights by Sergeants Garrison and Hoff and agreed to give another tape-recorded statement to "confirm" that he was the shooter. Defendant had not yet had an opportunity to consult with counsel. When asked whether he had been promised anything for his statement, defendant replied that nothing had been actually guaranteed, but something would be worked out.

Prior to trial, a lengthy *Walker* hearing was conducted. The trial court ruled that all of defendant's statements were admissible because he had been advised of his *Miranda* rights before each statement was given, he never requested an attorney during the interrogations, he knowingly and voluntarily waived his rights each time, no improper promises or threats were made by the police, and

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[11] Subsequent to these statements, the police reinterrogated Michael White, who had repeatedly denied any involvement. Defendant was brought into the interrogation room to persuade White to confess. This interrogation session was tape recorded. White subsequently confessed to the murder after arraignment.

the statements were not the result of any illegal delay in arraignment.[12]

In affirming defendant's conviction for second-degree murder,[13] the Court of Appeals upheld the trial court's findings of fact. As to the post-arraignment statement, the court noted that the original panel in *Bladel* had found a knowledgeable and voluntary waiver of the right to counsel on almost identical facts. *Edwards* and *Paintman* were distinguished on the grounds that defendant asked for an attorney at arraignment, rather than during police interrogation. This request was "not made in such a way as to effectively exercise the right to preclude any subsequent interrogation" and was unrelated to defendant's Fifth Amendment right to counsel. 114 Mich App 649, 658-659; 319 NW2d 613 (1982). We granted defendant's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

II

Defendants argue that their post-arraignment statements were obtained in violation of their Fifth and Sixth Amendment rights to counsel because they asked the arraigning magistrate for appointed counsel. To determine whether these statements are admissible, the following questions must first be resolved:

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[12] However, White's confession was suppressed as being coerced. Primarily on the basis of the recorded interrogation of August 1, the trial court found that the police had ignored White's requests for counsel and improperly offered plea bargains.

[13] The Court of Appeals vacated defendant's conviction and sentence for conspiracy to commit second-degree murder because the crime could not logically exist. The court reasoned that defendant could not have conspired to commit a criminal act which by definition is committed without premeditation and deliberatioon. The prosecutor has not challenged this ruling on appeal to this Court.

1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?

2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?

3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations?

A

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20.[14] However, these constitutional rights are distinct and not necessarily coextensive. See *Rhode Island* v *Innis,* 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In *Miranda,* the United States Supreme Court declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation in order to protect the accused's Fifth Amendment privilege against compulsory self-incrimination. *Innis, supra,* p. 297; *Edwards, supra,* 451 US 481. However, the Fifth Amendment right to counsel attaches only when an accused is in custody, *United States* v *Henry,* 447 US 264, 273, fn 11; 100 S Ct 2183; 65 L Ed 2d 115 (1980), and subjected to interrogation. *Innis, supra,* p 298; *Kirby* v *Illinois,* 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972). Once an accused invokes his right to have counsel present during custodial interrogation, the police must

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[14] Const 1963, art 1, § 17 provides in relevant part:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Const 1963, art 1, § 20 provides in relevant part:

> "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense . . . ."

refrain from further interrogation until counsel is made available, unless the accused initiates further communications, exchanges, or conversations with the police. *Edwards, supra,* pp 484-485; *Paintman, supra,* 412 Mich 526. Neither *Miranda* nor its progeny limits the Fifth Amendment right to counsel to custodial interrogations conducted prior to arraignment. Since defendants were clearly subjected to custodial interrogation when they made their post-arraignment confessions, their Fifth Amendment right to counsel had attached.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *United States* v *Gouveia,* —— US ——, ——; 104 S Ct 2292; 81 L Ed 2d 146, 153-154 (1984); *Kirby, supra,* 406 US 688-689. The accused is entitled to counsel not only at trial, but at all "critical stages" of the prosecution, *i.e.,* those stages "where counsel's absence might derogate from the accused's right to a fair trial." *United States* v *Wade,* 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. *Henry, supra,* 447 US 271-273. See also *Brewer* v *Williams,* 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977); *Massiah* v *United States,* 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964). This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. *Brewer, supra,* pp 404-405. Since defendants were interrogated subsequent to arraignment, they were also entitled to counsel under the Sixth Amendment.

B

The foregoing analysis demonstrates that defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel. Although defendants were in custody at the time of their arraignments, they were not subjected to interrogation. In addition, they did not specifically request counsel for any subsequent custodial interrogations which might be conducted. Defendants requested appointed counsel because they were financially incapable of retaining an attorney and were unwilling to represent themselves. See *State* v *Sparklin,* 296 Or 85; 672 P2d 1182, 1185-1186 (1983).

C

The trial courts found that defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their *Miranda* rights prior to their statements. Our independent review of the record does not disclose that these findings are clearly erroneous. *People* v *McGillen #1,* 392 Mich 251, 257; 220 NW2d 677 (1974); *People* v *Robinson,* 386 Mich 551, 557; 194 NW2d 709 (1972).

III

The question remains whether defendants' waiver of their Fifth Amendment right to counsel also waived their Sixth Amendment right to counsel. Defendants were given standard *Miranda* warnings prior to their post-arraignment interrogations. However, these warnings were designed to advise an accused only of his Fifth Amendment rights. The Sixth Amendment right to counsel is considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution. Neither the United States Supreme Court nor this Court has de-

lineated specific procedural requirements for waiver of the Sixth Amendment right to counsel.[15]

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[15] Although *Edwards* arguably involved a statement obtained after judicial criminal proceedings had commenced, the Supreme Court specifically declined to address the Sixth Amendment question because the state court had no done so. *Edwards, supra,* 451 US 480, fn. 7. Similarly, in *Conklin* (the companion case to *Paintman*), a confession was obtained seven days after the defendant requested counsel during his arraignment. See *Paintman, supra,* 412 Mich 526. This Court did not discuss the Sixth Amendment ramifications of this request since Paintman and Conklin had also invoked their Fifth Amendment right to counsel prior to arraignment.

Numerous courts have attempted to define what procedural requirements are sufficient to ensure that a defendant's waiver of his Sixth Amendment right to counsel is voluntary, knowing and intelligent. See cases cited in *People* v. *Green,* (Levin, J., *dissenting*), 405 Mich. 273, 302-304, and fns. 5-8; 274 NW2d 448 (1979), and Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel,* 82 Colum L R 363, 369, fn 42 (1982). Some courts have held that a valid waiver of *Miranda* rights alone is sufficient, while other courts require that the defendant be specifically informed of his Sixth Amendment rights by the police or a neutral magistrate. Some cases apparently have turned on the particular facts presented, *e.g.,* whether the defendant or the police initiated the conversation which resulted in the confession, or whether the police were aware that defendant had been arraigned, had requested counsel, or had obtained counsel by the time the interrogation was conducted. *Id.*

Recent law review articles generally advocate that higher standards be implemented to safeguard the Sixth Amendment right to counsel. See, *e.g.,* 82 Colum L R, *supra,* p 381 (defense counsel should be present when defendant waives his right to counsel); Note, *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers,* 60 Boston U L R 738, 762-764 (1980) (in addition to *Miranda* warnings, defendant must be told that he has been formally charged, the significance thereof, and how an attorney could assist him); Grano, *Rhode Island* v *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 Am Crim L R 1, 35 (1979) (police cannot elicit information from defendant unless they seek to notify counsel; if on attorney exists, defendant's waiver must meet the standards that govern waiver of the right to counsel at trial pursuant to *Faretta* v *California,* 422 US 806; 96 S Ct 2525; 45 L Ed 2d 562 [1975]); *cf. Constitutional Law—Right to Counsel,* 49 Geo Washington L R 399, 409-410 (1981)

A

Courts which have specifically addressed the problem of requests for counsel at arraignment have reached differing results both before and after *Edwards* was decided. The Second Circuit Court of Appeals has adopted the strictest procedural requirements for waiver of the Sixth Amendment right to counsel. In *United States* v *Satterfield,* 558 F2d 655, 657 (CA 2, 1976), defendant's post-indictment and post-arraignment statements were suppressed, even though he had executed a written waiver of his *Miranda* rights. The Court reasoned that even if the statements were voluntary for purposes of the Fifth Amendment "they were involuntary with 'regard . . . [to] the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' "

Specific procedural safeguards were adopted in *United States* v *Mohabir,* 624 F2d 1140 (CA 2, 1980).[16] The *Mohabir* Court explained that a higher standard for waiver of counsel is required after judicial proceedings have commenced because the government has committed itself to prosecute, and any questioning by the government can only be for the purpose of buttressing its prima facie case.

(*Miranda* warnings sufficient unless defendant indicted before arrest). United States Supreme Court Justice Thurgood Marshall has also consistently advocated a higher standard for waiver of the Sixth Amendment right to counsel. See *Wyrick* v *Fields* (Marshall, J., *dissenting*), 459 US 42, 54-55; 103 S Ct 394; 74 L Ed 2d 214 (1982), *cert den after remand* —— US ——; 104 S Ct 556; 78 L Ed 2d 728 (1983).

[16] *Mohabir* involved an indirect request for counsel to the arraigning magistrate. Before interrogation, defendant was advised several times of his *Miranda* rights, the nature of the charegs against him, and the fact that he had been indicted. He was also given a copy of the indictment, but was not informed of the significance thereof. During interrogation, defendant was asked if he would need counsel appointed for arraignment. He replied affirmatively, but questioning continued. The arraigning magistrate was informed of defendant's request and contacted an attorney to represent defendant.

Informing a defendant of his *Miranda* rights and the fact that he has been indicted is insufficient, since this information may not allow the accused to " 'appreciate the gravity of his legal position, and, the urgency of his need for a lawyer's assistance.' " *Id.*, pp 1148-1150. In the exercise of its supervisory power, the *Mohabir* Court held that an accused may not validly waive his Sixth Amendment right to counsel unless a federal judicial officer has explained the content and significance of this right.[17] Furthermore, the accused must be shown the indictment and informed of its significance, the right to counsel, and the seriousness of his situation should he decide to answer further police questions without counsel. The Court believed that this procedure would minimize disputes as to what warnings were actually given and whether defendant fully comprehended his rights. *Id.*, p 1153.

The Fifth Circuit, on the other hand, has reached conflicting results, primarily because it has not adequately distinguished the Fifth and Sixth Amendment rights to counsel. In *Blasingame* v *Estelle*, 604 F2d 893, 895-896 (CA 5, 1979), the Court stated that the crucial inquiry is whether defendant's assertion of his right to counsel before the arraigning magistrate was made in such a manner that the subsequent police questioning "impinged on the exercise of the suspect's continuing option to cut off the interview." It was noted that some defendants may wish to have an attorney represent them in legal proceedings, yet wish to assist the police by responding to questions without an attorney being present. The Court found that Blasingame's request was not an invocation of his Fifth

[17] The *Mohabir* Court refused to allow the prosecutor to give this advice since he is an adversary of the defendant. It postponed consideration of a third alternative, *i.e.*, "outlawing" all statements made by an indicted defendant following an uncounseled waiver. The Court noted that such an approach could conflict with the defendant's constitutional right to represent himself under *Faretta* v *California*, *supra*. *Mohabir*, *supra*, 624 F2d 1151-1153.

Amendment right to confer with or have counsel present during questioning. Since he was informed of his *Miranda* rights at arraignment and before his subsequent interrogation, and had voluntarily and intelligently waived these rights, his post-arraignment statements were admissible.[18] *Blasingame*, however, was decided solely on Fifth Amendment grounds.

A contrary result was reached in *Silva* v *Estelle*, 672 F2d 457 (CA 5, 1982). There, defendant was questioned one hour after he asked the arraigning magistrate for permission to call his attorney. This request was construed as an unequivocal exercise of defendant's right to counsel. The *Silva* Court concluded that under *Edwards*, the police were not entitled to initiate further interrogation unless they first honored defendant's request for counsel. Like *Blasingame*, *Silva* did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel.

Shortly after *Silva* was decided, *Jordan* v *Watkins*, 681 F2d 1067, 1073-1075 (CA 5, 1982), held that the police, who were not aware that counsel had been appointed at arraignment, properly interrogated the defendant. *Edwards* was distinguished on the grounds that Jordan had never requested counsel with respect to custodial interrogation or attempted to cut off questioning; he merely wanted counsel to assist him in further judicial proceedings. (The *Jordan* Court relied heavily upon *Blasingame* in reaching this conclusion, but did not mention *Silva*.) After examining the totality of the circumstances, the Court found that Jordan had voluntarily, knowingly, and intelligently waived both his Fifth and Sixth Amendment rights to counsel.

In contrast, the Sixth Circuit held, in *United States* v *Campbell*, 721 F2d 578, 579 (CA 6, 1983), that incriminat-

[18] The Court of Appeals relied primarily on *Blasingame* in concluding that Bladel and Jackson's post-arraignment statements were admissible.

ing statements obtained thirteen minutes after defendant requested and was appointed counsel were inadmissible. The Court noted that the interrogating agents had manifested an indifference to, if not an intentional disregard for, defendant's Sixth Amendment right to counsel and Fifth Amendment right against compulsory self-incrimination, primarily because they were present when defendant requested counsel. The agents improperly conducted "one last round of interrogation" before defendant had an opportunity to consult with counsel. Such conduct clearly violated *Edwards*. *Jordan* was distinguished because Campbell had not voluntarily, knowingly, and intelligently waived his Fifth Amendment right to counsel by initiating the post-arraignment conversation.

Several state supreme courts have addressed this problem, but have also reached conflicting results. In *Johnson* v *Commonwealth*, 220 Va 146, 158-159; 255 SE2d 525 (1979), *later app* 221 Va 736; 273 SE2d 784 (1981), *cert den* 454 US 920; 102 S Ct 422; 70 L Ed 2d 231 (1981), the police initiated interrogation five hours after defendant requested counsel at arraignment. The Virginia Supreme Court held that defendant's confession was admissible because he had knowingly, intelligently, and voluntarily waived his right to counsel prior to interrogation. The Court found that the police officers' conduct was not coercive, they were not aware that defendant had been arraigned, and defendant had never requested counsel during the interrogation. However, the *Johnson* Court did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel. Furthermore, the case was decided prior to *Edwards*.

The United States Supreme Court ultimately denied defendant's petition for certiorari, over a lengthy dissent written by Justice Marshall. He believed that the decision to admit the confession was contrary to the spirit, if not the letter, of *Edwards*. He rejected the state's attempt to distinguish *Edwards*:

"The State attempts to distinguish *Edwards* on two grounds. First, it points out that Edwards clearly expressed his desire to deal with police only through counsel, whereas petitioner here simply asked that an attorney be appointed. However, an accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminished. As we stated in *Fare* v *Michael C.*, 442 US 707, 719 [99 S Ct 2560; 61 L Ed 2d 197] (1979), 'an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'

"Second, the State notes that Edwards informed the police of his desire for an attorney, whereas petitioner only informed the judge at his arraignment. The State suggests that since the police did not know about petitioner's request, the interrogation was not improper. However, the police could easily have determined whether petitioner had already exercised his right to counsel; presumably, a prosecutor was present at the arraignment. They did not know about petitioner's request for a lawyer only because they made no effort to determine whether such a request had been made. But even if the police could not have discovered that petitioner had expressed a desire for an attorney, I would hold that the confession should not have been admitted. The key question in this case is whether petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. In determining whether these conditions were satisfied, the fact that the police were unaware of a prior request for counsel is only tangentially relevant. What is important, rather, is the state of mind of the accused. I think it is no more safe to assume that a waiver is valid when an accused has made a prior request to the judge at his arraign-

ment than when he has made the request to police. In both cases, the accused informs an individual in authority that he would like an attorney—and yet shortly thereafter, state officials, apparently disregarding his request, ask him to waive his rights." 454 US 922-923.

In *State* v *Sparklin*, 296 Or 85; 672 P2d 1182 (1983), the Oregon Supreme Court carefully differentiated between the two constitutional rights to counsel. There, defendant requested an attorney at his arraignment on a forgery charge stemming from the use of a stolen credit card. That evening, the police interrogated him concerning an assault on the credit card owner and a factually unrelated murder and robbery. Defendant waived his *Miranda* rights and confessed to the murder.

The *Sparklin* Court initially found that defendant had not invoked either his state or Fifth Amendment right to counsel or privilege against compulsory self-incrimination during arraignment. Unlike an interrogation session, a defendant is not confronted with an atmosphere of coercion or attempts to gain admissions during arraignment. Without a more explicit request or one made in anticipation of, or during interrogation, defendant's request for an attorney was deemed to be merely "a matter of routine." *Id.*, pp 1185-1186.

Turning to the Sixth Amendment right to counsel and its state counterpart, the *Sparklin* Court noted that pursuant to its earlier interpretations of the Oregon Constitution, the state was required to notify the defendant's attorney prior to interrogation and afford him an opportunity to be present. Furthermore, the defendant could not waive his state constitutional right to counsel until he had consulted with his attorney, although he could volunteer statements on his own initiative. *Id.*, p 1187. Although the comparable Sixth Amendment right to counsel was not so clearly defined, the court believed that it was of equal

scope. *Id.*, p 1188. In dicta, the Court noted that if defendant had been questioned for the crimes against the credit card owner, the interrogation would have been improper since no waiver could have been given before counsel was consulted. *Id.*, p 1190.[19]

The most recent decision is *State* v *Wyer*, 320 SE2d 92 (W Va, 1984). After reviewing numerous cases, the West Virginia Supreme Court concluded that there is no rule per se against waiver of the Sixth Amendment right to counsel. However, it believed that such a waiver should be judged by stricter standards than a waiver of the Fifth Amendment right to counsel. The *Wyer* Court refused to equate a general request for counsel at arraignment with an *Edwards* direct request for counsel to an interrogating officer, since the Sixth Amendment right attaches regardless of whether a specific request is made. Thus, the police could initiate questioning after a defendant requests counsel at arraignment, as long as the defendant is willing to waive his Sixth Amendment right.

In order to ensure a valid waiver of the Sixth Amendment right to counsel, the *Wyer* Court held that a defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his *Miranda* rights. If the defendant asserts his *Edwards* right to counsel when the waiver is sought, interrogation must cease until counsel is made available, unless the defendant initiates further communications with the intent to waive his Sixth Amendment right to counsel. The interrogating officer's knowledge that counsel has been requested was deemed to be only "one ingredient" in determining whether the waiver was valid, rather than an absolute bar. *Id.*, p 105 and fns 23 & 25.

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[19] However, since the interrogation related to a criminal episode unrelated to the one on which defendant was arraigned and for which counsel was obtained, the *Sparklin* Court concluded that the confession was properly obtained. 672 P2d 1188.

The *Wyer* dissent persuasively argued that if a *Miranda* waiver is inadequate to protect the Fifth Amendment right to counsel under *Edwards,* it certainly would be inadequate to protect the greater Sixth Amendment right. The dissent believed that once a defendant makes an oral or written request for counsel to the magistrate, the police must notify his lawyer and refrain from further interrogation until the defendant has spoken to him. If, after consultation, the defendant wishes to forego his right to counsel, he can then do so. The officer's presence at arraignment was deemed an irrelevant consideration, since both he and the prosecutor have a duty to discover whether the defendant has been arraigned and if he requested counsel. Such safeguards would not prevent confessions, but only guarantee that they were voluntary and obtained without violating the defendant's right to counsel. The dissent concluded:

> "[I]t is time to recognize that all defendants without counsel are constitutionally disadvantaged when faced with a government armory of armed police, prosecutors and professional interrogators." *Id.*, p 111.

B

As the foregoing discussion demonstrates, no consistent approach to the waiver problem has emerged. However, it is clear that no court has adopted a per se rule which prevents a defendant from ever waiving his Sixth Amendment right to counsel.[20] We also decline to adopt such a rule.

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[20] Although the United States Supreme Court sidestepped this issue in *Brewer, supra,* 430 US 405-406, it suggested that a Sixth Amendment waiver was not precluded in *Estelle* v *Smith,* 451 US 454, 471, fn 16; 101 S Ct 1866; 68 L Ed 2d 359 (1981). Moreover, the Supreme Court has stated that the Sixth Amendment right to counsel may be waived at a post-indictment lineup. *Wade, supra,* 388 US 237. In addition, a defendant has a constitutional right to waive the assistance of counsel at trial, as long as the trial court advises the defendant of the dangers and disadvantages of self-representation and the defendant knowingly and voluntarily waives his right to counsle. *Faretta, supra,* 422 US 835; *People* v *Anderson,* 398 Mich 361, 368; 247 NW2d 857 (1976).

It is also clear that if defendants had invoked their Fifth Amendment right to counsel to the police, *Edwards* and *Paintman* would have barred all further interrogation until defendants had an opportunity to consult with counsel, since they did not reinitiate further conversations with the police. The United States Supreme Court adopted this prophylactic rule to protect an accused from being badgered by the police while in custody. *Oregon* v *Bradshaw,* 462 US 1039, ——; 103 S Ct 2830; 77 L Ed 2d 405, 411 (1983).

Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished.

Furthermore, once adversary judicial proceedings have commenced, the police have "everything to gain" and the accused "everything to lose" when "one last round" of interrogation is conducted before counsel arrives:

> "As Justice Stewart noted in *Kirby* v *Illinois, supra,* 406 US at 689-690:
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> "'The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of

our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.' • • •

"The indictment thus marks a crucial point for the defendant; it also marks the point after which any questioning of the defendant by the government can only be 'for the purpose of buttressing . . . a prima facie case. . . . [S]ince the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged . . ., the necessities of appropriate police investigation "to solve a crime, or even to absolve a suspect" cannot be urged as justification for any subsequent questioning of the defendant.'

• • •

"[A]s Judge Knapp pointed out in *United States* v. *Satterfield*, 417 F Supp 293, 296 (SDNY), aff'd, 558 F2d 655 (CA 2, 1976):

" 'Prior to indictment—before the prosecution has taken shape—there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him after a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor

that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.' " *Mohabir, supra,* 624 F2d 1148-1149.[21]

Finally, it is clear that every court has acknowledged that the Sixth Amendment right to counsel is as important, if not more so, than the judicially created Fifth Amendment right to counsel. As such, it is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart. We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of *Miranda* rights. The majority of these cases did not sufficiently distinguish between the concerns underlying the Fifth and Sixth Amendment rights to counsel. As the *Wyer* dissent noted, if a *Miranda* waiver is insufficient to ensure a valid waiver of the Fifth Amendment right to counsel pursuant to *Edwards,* it certainly should be inadequate to ensure a valid waiver of the greater Sixth Amendment right.

C

We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that, *at a minimum,* the *Edwards/Paintman* rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate.[22] Once this request occurs,

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[21] See also 82 Colum L R, *supra,* pp. 372-373.

[22] We do not decide under what circumstances the police may interrogate a defendant who has not specifically requested appointed counsel at arraignment, or who has already consulted with counsel. We note only that these defendants must waive both their Fifth and Sixth Amendment rights to counsel before post-arraignment interrogation may proceed.

the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.[23] If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. See *Bradshaw, supra,* —— US ——; 77 L Ed 2d 413; *Johnson* v *Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

We further hold that before commencing interrogation, the police have an obligation to determine whether an accused has been arraigned and requested counsel. This duty is no more onerous than that imposed by *Edwards* and *Paintman.* As Justice Williams observed in his dissent in *People* v *Esters,* 417 Mich 34, 64; 331 NW2d 211 (1982):

> "[T]he defendant's rights may not be diminished merely because the state fails to respond to defendant's request for counsel, as it should have done. Once he has asked for counsel, the defendant has done all that is within his power to secure this guaranteed right."

We also note that the police officers who were in charge of the investigations in both *Bladel* and *Jackson* were present at the arraignments when defendants requested appointed counsel. Although the officers who later interrogated Bladel were not present at arraignment, Bladel informed them of his request prior to questioning. In both cases, the police were attempting to strengthen their cases

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[23] This rule is consistent with the result reached in *People* v *Green,* 405 Mich 273; 274 NW2d 448 (1979), since defendant there reinitiated further communications with the police. However, we do not suggest that the warnings given in *Green* are sufficient to effectuate a valid waiver of the Sixth Amendment right to counsel. That issue was not presented in *Green* and we need not decide it here.

by conducting "one last round" of interrogation before counsel arrived. Interrogations of defendants who are represented by counsel without counsel's knowledge have been repeatedly criticized. See, *e.g., United States* v *Campbell,* 721 F2d 578, 579 (CA 6, 1983); *United States* v *Cobbs,* 481 F2d 196, 200 (CA 3, 1973), *cert den* 414 US 980; 94 S Ct 298; 38 L Ed 2d 224 (1973); *United States* v *Springer,* 460 F2d 1344, 1353 (CA 7, 1972), *cert den* 409 US 873; 93 S Ct 205; 34 L Ed 125 (1972); *Paintman, supra,* 412 Mich 529-530.

The police cannot simply ignore a defendant's unequivocal request for counsel. As this Court noted in *Paintman, supra*:

> "Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim."

In fact, defendant Bladel specifically testified that he began to doubt whether he would have counsel appointed because he did not meet with an attorney until three days after his arraignment. Furthermore, when he asked the jail personnel and the interrogating officers whether counsel had been appointed for him, they repeatedly pleaded ignorance.

Since defendants Bladel and Jackson requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained and must be suppressed. Plaintiffs nevertheless maintain that defendants' statements need not be suppressed because they were tried before *Edwards* was decided. In *Solem* v *Stumes,* —— US ——, ——; 104 S Ct 1338; 79 L Ed 2d 579, 59 (1984), the Supreme Court refused to apply *Edwards* retroactively to collateral

reviews of final convictions. The Court, however, specifically declined to decide whether *Edwards* could be applied retroactively to defendants whose convictions were not yet final when the decision was issued.

We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the *Edwards/Paintman* rule *by analogy* to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20. Given the Supreme Court's holding that *Edwards* established a new "bright line" test,[24] the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue.

IV

Defendant Jackson further argues that his six pre-arraignment confessions were inadmissible because the police deliberately delayed arraignment in order to obtain them or the confessions were induced by police threats and promises. The trial court rejected both arguments. The Court of Appeals agreed that the pre-arraignment delay was not used to extract a confession. Defendant was properly advised of his *Miranda* rights before each session and, according to the police officers, he volunteered his statements. 114 Mich App 654-655.[25]

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[24] *Solem, supra,* p. 589; *cf. Paintman, supra,* 412 Mich 530-531.

[25] On appeal to this Court, defendant does not challenge the trial court's findings that he was properly advised of his rights before each statement was given and that he never requested an attorney until arraignment.

A

Although the police had sufficient probable cause to obtain a warrant for defndant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was "arrested" on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885; *People* v *Mallory,* —— Mich ——; —— NW2d —— (1984) (slip op, p 5); *People* v *White,* 392 Mich 404, 424; 221 NW2d 357 (1974), *cert den sub nom Michigan* v *White,* 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1975). Immediate arraignment is not required, however. Circumstances may require a brief delay for "booking," a quick verification of the accused's volunteered "story," or a brief questioning to determine the immediate question of release or complaint. *Mallory* v *United States,* 354 US 449, 454-455; 77 S Ct 1356; 1 L Ed 2d 1479 (1957); *People* v *Hamilton,* 359 Mich 410, 416-417; 102 NW2d 738 (1960). Even where an unnecessary delay has occurred, admissions or confessions obtained during this period will not be excluded unless the delay was employed as a tool to extract the statement. *Mallory, supra,* —— Mich —— (slip op, p 5); *White, supra.*

Defendant was not arraigned until August 1 at 4:30 p.m., approximately 26½ hours after his arrest. He was first interrogated shortly after arriving at the Livonia police station. The police initially obtained background information from defendant and informed him of his rights, the

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Our independent review of the record does not disclose that these findings are clearly erroneous.

Since the trial court found the police officers to be more credible, the following discussion of the facts is based upon the officers' testimony at the *Walker* hearing.

nature of the charges against him, and the mandatory punishment of life imprisonment for first-degree murder. They then confronted him with Knight's statement that defendant and another person had committed the murder. At approximately 3:30 p.m., defendant admitted that he was present during the murder, but maintained that Knight was with him and had shot the victim.

We conclude that this first oral statement was not obtained during a period of unreasonable delay. The officers' questioning occurred 1½ hours after the arrest and was for the purpose of determining whether Knight had unjustly accused defendant.

Sergeant Richard Ericson, another officer in charge of the case, testified at the *Walker* hearing that after this first confession, the police had sufficient information to obtain an arrest warrant against defendant. Sergeant Hoff testified similarly, but explained that they could not have obtained a warrant because the prosecutor's office was closed and there was no one available to authorize the warrant request. Shortly after the first statement was given, the police asked defendant to repeat his statement so that it could be tape-recorded. Defendant agreed. The recording began at 5:52 p.m. However, the quality of the recording was so poor that the police asked defendant to repeat the statement again. The second taping began at 8:48 p.m. The content of these two recorded statements did not substantially differ from that of the prior oral statement.

Giving the police the benefit of the doubt, we conclude that no unreasonable delay occurred between the arrest and the time these two taped statements were given. If any unreasonable delay occurred, it was not used to extract a new statement, but merely to memorialize the first oral statement.[26]

[26] However, our conclusion in no way condones the officers' actions. Defendant's first confession, when coupled with Knight's statement, presented more than enough evidence to arraign defendant for conspiracy and first-degree murder. The only purpose in recording defendant's statement was to strengthen the prosecution's case against him and his co-defendants prior to arraignment. The result in this case might have been different if the first oral statement had been obtained earlier in the day, if it had materially differed from the subsequently recorded statements, or if the recorded statements were the product of more intensive interrogation.

After the second taped statement, defendant was confronted by the fact that his version still differed from Knight's, *i.e.*, defendant claimed that he and Knight were present but that Knight was the shooter, while Knight claimed that defendant and White committed the murder. The police noted that Knight had agreed to undergo a polygraph examination the following morning and requested that defendant undergo one also. Defendant agreed.

The examination began at approximately 10 a.m. The polygraph examiner informed defendant of his rights and that he did not have to submit to the exam. Defendant still agreed to the polygraph. Afterwards. the examiner informed defendant that he had not been truthful and urged him to tell the other officers the truth in order to maintain his credibility. Defendant then confessed to the examiner that he had shot the victim and that White, not Knight, had been present. The examiner immediately informed Sergeant Hoff, who was waiting outside the polygraph room. Shortly thereafter, Sergeant Hoff met with defendant, advised him of his rights, and obtained substantially similar oral and written statements.

Primarily on the basis of the officers' testimony at the *Walker* hearing, we conclude that the three post-polygraph statements were obtained during an unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements. Sergeant Hoff testified that if an arrest warrant had been issued during the morn-

ing of August 1, defendant could have been arraigned at that time, except for the polygraph exam. Sergeant Ericson testified that he began preparing the 36-page warrant request for all four defendants at 9:30 a.m. on August 1, and finished at 1 p.m. On cross-examination, however, he stated that he had previously prepared a request and obtained a warrant for codefendant Perry. The warrant requests for Perry and defendant were substantially similar, except for the information concerning Knight's statements, and defendant's pre- and post-polygraph confessions. Sergeant Ericson thereafter presented the request to the prosecutor's office, obtained the complaints and warrants, and arrived at the Livonia District Court at approximately 4:30 p.m. for the arraignment.

Although the thoroughness with which the warrant request was prepared may be commendable, the police cannot justify infringing upon a defendant's statutory and constitutional rights to a prompt arraignment merely on the grounds that their "paperwork" has not yet been completed. A contrary conclusion would encourage dilatory efforts in seeking and obtaining the prosecutor's authorization. It must be remembered that a magistrate is required to issue an arrest warrant upon presentation of a proper complaint alleging the commission of an offense and upon a finding of reasonable cause to believe that the accused committed the offense. MCL 764.1a; MSA 28.860(1). The complaint need not contain every fact which contributed to the affiant's conclusions, nor must every factual allegation be independently documented. The complaint simply has to be sufficient enough to enable the magistrate to determine that the charges are not capricious and are sufficiently supported to justify further criminal action. *Jaben* v *United States*, 381 US 214, 224-225; 85 S Ct 1365; 14 L Ed 2d 345 (1965); *United States* v *Fachini*, 466 F2d 53, 56 (CA 6, 1972). In addition, a complaint may thereafter be amended if additional evidence so requires. The police and the prosecutor here had sufficient evidence to draft a

complaint and obtain a warrant before or shortly after defendant was arrested. There was no need, for purposes of arraignment, to determine whether Knight or defendant was telling the truth.

The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible.[27]

B

After reviewing the record, we conclude that the trial court did not clearly err in finding that defendant's three

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[27] Plaintiff suggests that even if an unnecessary pre-arraignment delay occurred, the ultimate test for purposes of the exclusionary rule is whether the statement obtained was voluntary or coerced. See, *e.g.*, *People* v *Wallach*, 110 Mich App 37, 59, fn 5; 312 NW2d 387 (1981), *vacated and remanded on other grounds* 417 Mich 937; 331 NW2d 730 (1983); *People* v *Antonio Johnson*, 85 Mich App 247, 252-253; 271 NW2d 177 (1978). Although earlier decisions of this Court could be interpreted in this manner, see, *e.g.*, *People* v *Farmer*, 380 Mich 198; 156 NW2d 504 (1968); *People* v *Ubbes*, 374 Mich 571; 132 NW2d 669 (1965); *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962); *Hamilton, supra*, an examination of *White, supra*, 392 Mich 424-425, reveals that this Court now treats the question of pre-arraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a pre-arraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations. See *Mallory, supra*, —— Mich —— (slip op, p. 5).

pre-polygraph confessions were not improperly induced by threats or promises.[28] In light of our prior conclusion that the post-polygraph confessions are inadmissible, we need not determine whether they were the product of threats or promises. Although defendant's three pre-polygraph confessions implicated him in the murder at least as an aider and abettor, a new trial is required. Defendant testified before the jury that he did not make the first oral statement and that the two taped confessions were induced by police threats and promises. The cumulative effect of admitting seven confessions, as opposed to three, may have made a difference in the jury's determination of credibility.

V.

The decision of the Court of Appeals is affirmed in *Bladel* and reversed in *Jackson*. These cases are remanded to the trial court for further proceedings consistent with this opinion.

/s/ MICHAEL F. CAVANAGH
/s/ [Illegible]
/s/ CHARLES L. LEON
/s/ THOMAS GILES KAVANAGH

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[28] A review of the police officers' testimony reveals that if any threats or promises were made to defendant, they occurred after the second taped statement. Sergeant Ericson testified that he told defendant after the second taped statement that the police were primarily after Ms. Perry. Leniency was not mentioned until after the post-arraignment statement. Sergeant Garrison stated that defendant may have mentioned not wanting to go to jail on July 31, but he was informed that the police could not authorize pleas to less serious offenses. Sergeant Hoff testified that no one discussed pleas on July 31. He did mention the possibility of a plea to second-degreee murder if defendant cooperated and if the prosecutor agreed. However, this discussion occurred after the polygraph examination.

7-8 April 1984

STATE OF MICHIGAN
SUPREME COURT

No. 69749

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellant,*

v

RUDY BLADEL, *Defendant-Appellee.*

No. 69615

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*

v

ROBERT BERNARD JACKSON, *Defendant-Appellant.*

BEFORE THE ENTIRE BENCH

RYAN, J. *(concurring in part and dissenting in part).*

I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the *Edwards/Paintman* ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const 1963, art 1, § 20.

I do not agree, however, that the record in this case supports my brother's conclusion that the "post-polygraph" statements given by defendant Jackson are inadmissible for the reason stated. In my judgment, it is mere appellate speculation to conclude that the failure to arraign defendant Jackson during the morning of August 1 was "unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements." That conclusion carries with it the implicit charge that the Livonia police contrived to lawlessly delay the defendant's arraignment on the mere pretext of completing unneces-

sary "paperwork," but for the actual purpose of extracting more confessions from him knowing that procedure to be improper. In my judgment, that conclusion is unsupported in the record.

This Court's opinion at this appellate remove, four and one-half years after the event, that the Livonia police may have had enough evidence at 9:30 a.m. on the morning of August 1 to obtain a recommendation for a warrant from an assistant Wayne County prosecuting attorney, and in turn to obtain an arrest warrant from a district judge, without benefit of further interrogation of Jackson, might be correct. If so, the conclusion that it was unnecessary to delay defendant Jackson's arraignment until the afternoon might likewise be correct. It does not follow therefrom, however, that the decision of the Livonia police to proceed with the preparation of a 36-page warrant request, to conduct a polygraph examination to which the defendant Jackson had agreed the night before, and to question Jackson following the failed polygraph examination, decisively demonstrate that the officers unnecessarily delayed arraigning Jackson as a ruse to "extract the post-polygraph statements." It is equally plausible, on the record before us, that the officers honestly believed that they were insufficiently prepared to request and obtain a warrant in this major "murder for hire" case until the statutorily required warrant request was properly completed and approved, the previously scheduled polygraph examination was completed, and the defendant was afforded the opportunity to reconcile, if he wished to, the conflicts it revealed. See *United States* v *Lovasco*, 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1977) ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt").

/s/ James L. Pugh

/s/ James H. Brickley

7-8/April 1984

STATE OF MICHIGAN
SUPREME COURT

No. 69749

People of the State of Michigan, *Plaintiff-Appellant*,

v

Rudy Bladel, *Defendant-Appellee*.

No 69615

People of the State of Michigan, *Plaintiff-Appellee*,

v

Robert Bernard Jackson, *Defendant-Appellant*.

Boyle, J. *(dissenting)*.

In *People* v *Jackson*, I concur with the part of Justice Ryan's opinion regarding the post-polygraph statements. I would also find that appellant Jackson's post-arraignment statement, which it is undisputed was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter, was, in light of the overwhelming evidence, if error, harmless beyond a reasonable doubt. *Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). I would find in *People* v *Bladel* that the Sixth Amendment right to counsel, which the people concede had attached, was waived. *Brewer* v *Williams*, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), itself permits waiver. In concluding that waiver did not occur, Justice Stewart for the majority noted, "The Court of Appeals did not hold, nor do we, that under the circumstances of this case, Williams could not, without notice to counsel have waived his rights under

the Sixth and Fourteenth amendments." *Id.*, pp. 405-406. Justice Stewart further emphasized that the detective "did not preface this effort [to elicit a response] by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right." 430 US 405. In *Bladel* it is clear that when the defendant mentioned he had asked for an appointed attorney he was asked if he wanted an attorney present and the defendant stated that he did not need one. I would find an intentional relinquishment of a known right.

While I recognize both the importance of the Sixth Amendment right to counsel and the appeal of the symmetrical application of *Edwards* v *Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and *People* v *Paintman*, 412 Mich 518; 315 NW2d 418 (1982), I am unconvinced without further guidance from the United States Supreme Court that we are constitutionally obligated to reach this result.

/s/ PATRICIA J. BAGLE

APPENDIX B

CIRCUIT COURT OPINION

THE COURT: All right, thank you. Well, as to the interrogation of January 1, 1979, the Court finds that the prosecution has borne the burden of showing that that was a voluntary statement such as it was based upon the proper [108] advice of the defendant or to the defendant of his Miranda rights and that he knowingly and voluntarily, orally waived them. And, the same applies as to the statement interrogation of January 2, 1979.

As to the statements and confessions of March 26, 1979, the Court also finds that the rights were properly given to the defendant and that he knowingly waived them after acknowledging that he understood them.

Now, I understand the position of the defendant to the effect that he did demand counsel on March 23rd at his arraignment in District Court. Now, whether or not counsel was appointed by March 26th, incidentally, March 23rd, 1979 was a Friday and March 26th, 1979 was a Monday. And, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does affect the voluntariness and the affectiveness of the waiver of the rights.

Now, I don't know of any case why counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant the he shouldn't say anything or that he should not say anything without the presence of counsel. But, there is no case that I know of that says Miranda goes that far and so the holding is that the testimony or the substance of the statements of all [109] three occasions and the confessions will be admissible.

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APPENDIX C

MOTION TO SUPPRESS OR IN ALTERNATIVE FOR A WALKER HEARING

[Filed July 3, 1979]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF JACKSON

File No. 79-017105-FY

THE PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*

vs.

RUDY BLADEL, *Defendant*

Hon. Russell E. Noble

COMES Now Rudy Bladel, by and through his attorney, Douglas L. Williams, and hereby moves this Court to suppress the confession given to police officers or in the alternative, that the Court will hear evidence given to support a factual basis to suppress the aforementioned confession and in support gives the following:

That the defendant was arrested in Elkhart, Indiana, on March 22, 1979, and charged with the murder of three Conrail employees on or about December 31, 1978.

That he was returned to Jackson, Michigan on March 22, 1979 and arraigned before the Honorable Robert Crary, Jr., District Judge for the 13th District on March 23, 1979. (See Transcript of 13th District Court Arraignment.

That on March 23, 1979, the Court inquired as to the Defendant's intentions for retaining an Attorney (AT PP 4)

That the defendant answered the Court and did then and there declare his indigency and request Court Appointed Counsel. (AT PP 4, L-]6).

That this Court Appointed the Law Firm of Adams, Goler & Williams by letter dated March 23, 1979.

That the District Court set the preliminary examination date for April 3, 1979.

That on January 1, 1979 the defendant was arrested, given his rights, and informed of his right to counsel, and questioned TP]37

That the defendant refused to answer questions on January 1, 1979.

That the defendant was again questioned on January 3, 1979 and informed of a right to counsel and at such time no statement was given.

That at 9:25 on March 22, 1979, the defendant was given his rights and again questioned and the defendant did not confess any crime.

That the defendant was again questioned on March 26, 1979, at]2:42 p.m. He was advised of his right to counsel but none was present.

That the defendant gave a confession after questioning on March 26, 1979, without the benefit of counsel that he had requested on March 22, 1979.

That the letter appointing Adams, Goler & Williams was received on March 27, 1979 at 11:45 a.m.

WHEREFORE the defendant moves this honorable court that the confession taken on March 26, 1979 be suppressed and ordered not used in the trial in this matter or in the

alternative, that this court order that evidence be submitted to determine the voluntariness of the said confession.

/s/ DOUGLAS L. WILLIAMS
Douglas L. Williams
Attorney for defendant
715 West Michigan Avenue
Jackson, Michigan, 49201
787-8343

APPENDIX D

DIGEST OF CONFLICTING CASES

United States v *Clements,* 713 F2d 1030 (Fourth Circuit 1983). (Post indictment confession. Remand to District Court to determine if Defendant had been informed of the existence of the indictment against him. Apparently, Miranda warnings plus informing of existence of indictment is necessary Sixth-Amendment waiver.)

United States v *Estelle,* 604 F2d 983 (Fifth Circuit 1979). (Defendant requested court appointed counsel at arraignment. Subsequent police initiated interrogation was proper. Request for counsel at arraignment did not indicate a desire not to speak to police. Miranda rights given and waived. Confession properly admitted, request for counsel at arraignment does not bar police interrogation nor did an interrogation impinge on exercise of Defendant's rights.)

State v *Wyer,* 320 SE2d 93 WVa (1984). (Defendant arraigned by a Magistrate and requested counsel. Held: Defendant can waive Sixth Amendment right to counsel in absence of counsel. Sixth Amendment waiver is higher standard requiring Miranda warning, written waiver and Defendant must be informed he is under arrest and be informed of each of the charges against him. General Request for counsel at arraignment does not invoke Fifth Amendment right triggering *Edwards* v *Arizona.*)

United States v *Madley,* 502 F2d 1103 (Ninth Circuit 1974). (Interrogation by Federal agents in absence of Defendant's counsel appointed in state parole violation proceedings did not violate the spirit of *Massiah* v *United States.*)

Fields v *Wyrick,* 706 F2d 879 (Eighth Circuit 1983). (Three months after being charged, Defendant took a polygraph on counsel's advice. The polygraph showed decep-

tion, Defendant made inculpatory statements in explaining deceit. Defendant had been advised of Miranda rights and signed a waiver. Held: In context of case, waiver of either the Fifth or Sixth Amendment right to counsel is judged by same standard, waiver of Miranda rights was voluntary, knowing and intelligent abandonment of Sixth Amendment right to presence of counsel.)

Coughlan v *United States,* 391 F2d 371 (Ninth Circuit 1968). (Defendant was interrogated by police after appointment of counsel. The police were aware of appointment. Defense argues confession only knowing and truly voluntary when counsel is present to advise client. Held: Right to counsel can be waived in absence of counsel and was waived in the instant case.)

United States v *Brown,* 569 F2d 236 (Rehearing en banc reversing 551 F2d 639). (Fifth Circuit 1978). (Defendant charged under the state statute and appointed counsel. Federal agents interviewed Defendant at the courthouse on related federal charges. Defendant advised of and waived Miranda rights. Held: Waiver of Miranda warnings sufficient to waive any right to counsel therefore Sixth Amendment rights not violated.)

United States v *Payton,* 615 F2d 922 (First Circuit 1980). (Post-indictment, pre-arraignment confession. Miranda rights stated and waived. Defendant aware of indictment. Held: Miranda rights sufficient for Sixth Amendment waiver.)

Robinson v *Percy,* 738 F2d 214 (Seventh Circuit 1984). (Defendant arrested in New Hampshire on Wisconsin murder. After some interrogation and request for counsel, interrogation ceased. Police then reinitiated interrogation. Motion to Suppress denied. Habeas Corpus dismissed where advice and waiver of Miranda warnings amounted to waiver of Sixth Amendment right to counsel. The court analyzed waiver of Sixth Amendment right to counsel on individual

circumstances of each case.) (See also: *State* v *Norgaard,* 653 P2d 483 (Mont. 1982) and *State* v *Burbine,* 451 A2d 22 (R.I. 1982)).

United States v *Campbell,* 721 F2d 578 (Sixth Circuit 1983). (Defendant taken before a Magistrate after arrest, and was appointed counsel. Secret Service then took the Defendant to their office where they interrogated him without the presence of court appointed counsel. Secret Service agents were present when Magistrate advised Defendant of Miranda rights. The Court found indifference to Defendant's right to counsel and a Fifth Amendment violation under *Edwards.*)

State v *Sparklin,* 296 Oregon 85, 672 P2d 1182 (1983). (Defendant confessed during police initiated interrogation subsequent to Defendant's request for court appointed counsel at arraignment. Mianda rights were given and waived. The Court ruled the request to be invocation of Sixth but not Fifth Amendment right to counsel. Held: No interrogation by police can be proper after Sixth Amendment request for counsel without notice to counsel giving him a reasonable opportunity to attend.) (672 P2d at 1187).

United States v *Brown,* 699 F2d 585 (Second Circuit 1983). (Post-indictment, pre-arraignment and appointment, government initiated interrogation. Miranda rights given and waived. Held: Warnings under Miranda insufficient to meet higher standard for waiver to right to counsel under Sixth Amendment.)

Silva v *Estelle,* 672 F2d 457 (CA 5 1982). (State Court Defendant arraigned and requested permission to call his lawyer. At arraignment, *Magistrate informed Defendant of his Miranda rights.* Officer present at arraignment questioned Defendant immediately after arraignment. Held: Re-interrogation after invocation of right to counsel following Miranda rights violated *Edwards* v *Arizona.* The

court misconstrued *Edwards* to apply to Sixth Amendment cases as well as Fifth Amendment cases.)

United States v *Satterfield*, 558 F2d 655 (Second Circuit 1976). (Confession after arraignment and request for counsel violated Sixth Amendment right by failure to reach the higher standard of waiver.)

United States v *Mohabir*, 624 F2d 1140 (Second Circuit 1980). (Post-indictment statement made to Prosecutor. Miranda warnings are insufficient for higher standard waiver for Sixth Amendment rights. Defendant must understand the significance of indictment and the gravity of his position. *Exercising supervisory powers,* in light of the practice in the Second Circuit, apparently in violation of the Code of Professonal Responsibility, the court now requires full comprehension of rights by Defendants and advice of warnings by a judicial officer rather than by the Prosecutor.)

EDITOR'S NOTE

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(3)

No. 84-1539

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1984

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

RUDY BLADEL

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

BY: **F. Martin Tieber,** (P25485)
Deputy Defender

Ronald J. Bretz, (P26532)
Assistant Defender
720 Plaza Center
125 W. Michigan Avenue
Lansing, MI 48913
(517) 373-2463

Counsel for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT NOT REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT WHICH RESTS UPON SEPARATE, INDEPENDENT AND ADEQUATE STATE GROUNDS?

II. DID THE MICHIGAN SUPREME COURT ACCURATELY INTERPRET THE MICHIGAN AND FEDERAL CONSTITUTIONS IN HOLDING THAT AN ACCUSED WHO HAS REQUESTED COUNSEL AT HIS ARRAIGNMENT CANNOT BE SUBJECTED TO LATER POLICE INTERROGATION UNTIL COUNSEL HAS BEEN MADE AVAILABLE, UNLESS THE ACCUSED INITIATES FURTHER COMMUNICATIONS WITH THE POLICE?

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CONSTITUTIONAL PROVISIONS

CASES

COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's statement, but adds the following from the Michigan Supreme Court decision in this case:

> "Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Rand. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times." Petitioner's Appendix 5a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT WHICH RESTS UPON SEPARATE, INDEPENDENT AND ADEQUATE STATE GROUNDS.

The decision of the Michigan Supreme Court was based upon the Sixth and Fourteenth Amendments and upon Article 1, Section 20 of the Michigan Constitution.[1/] Because the Court gave equal emphasis to the state constitutional provision, it is clear that the Court's decision rested alternatively on separate, adequate and independent state grounds. Accordingly, this Court is without jurisdiction to decide the instant case.

In Michigan v Long, 458 US 966; 103 S Ct 3469, 3476; 77 L Ed2d 1201, 1214 (1983), this Court held that where it is claimed that a state court opinion rests upon independent and adequate state grounds, this Court has the authority to review the merits of the case if:

> "...a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion...."

Conversely, this Court will not attempt to review a state court decision if the state court "...indicates clearly and expressly that [the opinion] is alternatively based on bona fide separate, adequate and independent grounds." Id.

In its decision below, the Michigan Supreme Court did predicate its decision alternatively on the adequate and independent state constitutional right to

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1/ U S Const, Ams VI, XIV; Const 1963, art 1, §20.

counsel. The Court clearly stated that its decision was not based solely or even primarily on the federal constitution. The Michigan Supreme Court stated its holding as follows:

> "We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only to hold that at a minimum, the Edwards/Paintman[2/] rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate." See Petitioner's Appendix, 23a.
>
> * * *
>
> "We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20." See Petitioner's Appendix 26a.

Thus, the Michigan Supreme Court, in keeping with the holding of Michigan v Long, supra, did clearly announce that the basis for its decision "by analogy" was its interpretation of the federal and state constitutions. This decision was consistent with the Michigan Court's tradition of providing greater protections to the accused in dealing with the police. As early as 1929, the Michigan Supreme Court recognized the right to counsel during police interrogation. People v Cavanaugh, 246 Mich 680; 225 NW 501 (1929), and has extended the right to counsel to any identification procedure after the accused is in custody. People v Franklin Anderson, 389 Mich 155; 205 NW2d 461 (1973). Finally, the Michigan Supreme Court has held that Miranda[3/] warnings must be given in any situation where the accused is the focus of the police investigation even if there is no custody. People v Reed, 393 Mich 342; 224 NW2d 867 (1975), cert den, 422 US 1044, 1048; 95 S Ct 2660, 2665; 45 L Ed2d 696, 701 (1975). The ruling in the instant case prohibiting police-initiated interrogation after the accused has requested counsel at arraignment, is merely an extension of prior Michigan Supreme Court decisions respecting the right of the accused to choose to deal with the state through an attorney.

Another factor considered by this Court in Michigan v Long, supra, was the

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2/ Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed2d 378 (1981); People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert den, 456 US 995; 102 S Ct 2280; 73 L Ed2d 1292 (1982).

3/ Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

Michigan Supreme Court's exclusive reliance on federal law. 103 S Ct at 3474. In the instant case, the Michigan Supreme Court reviewed all available precedent, both federal and state. Indeed, one case, State v Sparklin, 296 Oregon 85; 672 P2d 1182 (1983), involved an extensive discussion by the Oregon Supreme Court on the right to counsel under the Oregon state constitution. Thus, unlike its decision in Long, the Michigan Supreme Court did not rely exclusively on federal law in the instant case.

Respondent recognizes that the Michigan Supreme Court did cite primarily federal decisions. However, this fact alone does not establish that the Michigan Supreme Court "decided the case the way it did because it believed federal law required it to do so." 103 S Ct at 3476. It merely establishes that most of the decisions on the right to counsel during interrogation have been federal cases. The Michigan Supreme Court, as it should, surveyed all of the state and federal decisions prior to reaching its own decision.

As this Court noted in Long, it is not inclined to render advisory opinions. Quoting from Herb v Pitcairn, 324 US 117, 124; 65 S Ct 459; 89 L Ed 789 (1945), this Court stated in Long:

> "'[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion'." 103 S Ct at 3476.

It seems clear that even if this Court were to reverse the decision of the Michigan Supreme Court on federal grounds, the decision under the Michigan constitution would not change. Four of the seven justices of the Michigan Court signed the lead opinion which, as noted, was equally based upon the state and federal constitutions. There is absolutely no indication that this majority "felt compelled" by the federal constitution nor that they would change their interpretation of the state constitution. If this Court grants certiorari and reverses the decision of the Michigan Supreme Court, its opinion will most likely be advisory.

Finally, if there is any doubt as to whether the Michigan Supreme Court intended to establish adequate and independent state grounds, Justice Ryan (dissenting) settled the issue by stating his objection to the Court's holding based on the state constitution. Justice Ryan stated:

> "I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the Edwards/-Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed,

inappropriate to base the result in these cases upon [Michigan] Const 1963, art 1, § 20." See Petitioner's Appendix 33a.

II. THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED THE MICHIGAN AND FEDERAL CONSTITUTIONS IN HOLDING THAT AN ACCUSED WHO HAS REQUESTED COUNSEL AT HIS ARRAIGNMENT CANNOT BE SUBJECTED TO LATER POLICE INTERROGATION UNTIL COUNSEL HAS BEEN MADE AVAILABLE, UNLESS THE ACCUSED INITIATES FURTHER COMMUNICATIONS WITH THE POLICE.

In its decision below, the Michigan Supreme Court held the following:

1) At the time of Respondent's confession, his right to counsel had attached under both the Fifth[4/] and Sixth Amendments;

2) The Sixth Amendment right to counsel, and its counterpart under the Michigan Constitution, Const 1963, art 1, §20, are at least as important as the judicially created Fifth Amendment right, if not more so;

3) The Sixth Amendment right to counsel is considerably broader than the Fifth Amendment right;

4) A waiver of the greater Sixth Amendment right to counsel after that right has been invoked cannot be based solely on a waiver of the Fifth Amendment Miranda rights;

5) At a minimum, the protections afforded pursuant to Edwards v Arizona to an accused who has invoked his lesser Fifth Amendment right must be extended, by analogy, to the accused who has invoked his Sixth Amendment right.

The critical holding of the Michigan Supreme Court is that the Sixth and Fourteenth Amendments protect an accused from continued police interrogation after the accused has invoked his right to counsel at arraignment by requesting the appointment of counsel. This holding is consistent with prior rulings of this Court and is consistent with both the federal and Michigan Constitutions.

Initially, it is clear that Respondent Bladel was entitled to counsel at his post-arraignment interrogation. It is further clear that Respondent was advised of his Fifth Amendment rights pursuant to Miranda v Arizona, waived those rights and confessed without having consulted an attorney. Thus, Respondent does not quarrel with the proposition that there was not a Fifth Amendment violation in this case.

4/ US Const, Am V.

Since Respondent had been arraigned, however, he was entitled to counsel at the time of interrogation pursuant to the Sixth Amendment. Kirby v Illinois, 406 US 682, 689; 92 S Ct 1877; 32 L Ed2d 411 (1972). The Sixth Amendment right to counsel is broader than the corresponding Fifth Amendment right in that the Sixth Amendment provides for legal assistance throughout all critical stages of the criminal prosecution. The Fifth Amendment right on the other hand

> "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v California, 384 US 757, 761; 86 S Ct 1826, 1830; 16 L Ed2d 908 (1966).

Moreover, not only is the Sixth Amendment right to counsel broader in purpose and scope than the corresponding Fifth Amendment right, but also "the policies underlying the two constitutional protections are quite distinct." Rhode Island v Innis, 446 US 291, 300, n4; 100 S Ct 1682, 1689, n4; 64 L Ed2d 297 (1980).

This Court's prior decisions regarding the Sixth Amendment and police elicitation of incriminating statements from the accused establish two important distinctions between the Fifth and Sixth Amendment rights, both of which lead to the conclusion that the Sixth Amendment right to counsel is broader and more difficult to waive. In order to show a violation of the Fifth Amendment, the defendant must first show that he was subject to custodial police interrogation. Miranda v Arizona, supra, 384 US at 444. A Sixth Amendment violation, on the other hand, does not require interrogation but merely "deliberate elicitation" of incriminating statements. United States v Henry, 447 US 264, 272; 100 S Ct 2183; 65 L Ed2d 115 (1980). Moreover, such elicitation without counsel can violate the Sixth Amendment even in the absence of custody. Massiah v United States, 377 US 201, 206; 84 S Ct 1199; 12 L Ed2d 246 (1964).

The second major distinction between the two corresponding rights to counsel involves waiver. A waiver of the Fifth Amendment right to counsel can be found by a showing that the suspect was advised of his Miranda rights and subsequently answered questions without any affirmative indication of waiver. North Carolina v Butler, 441 US 369, 374; 99 S Ct 1755; 60 L Ed2d 286 (1979). In Brewer v Williams, 430 US 399; 405; 97 S Ct 1232; 51 L Ed2d 424 (1977), the Court held that the defendant did not validly waive his Sixth Amendment right to counsel where he did not affirmatively relinquish it prior to the police

officer's deliberate elicitation of incriminating statements. Thus, while the Fifth Amendment does not necessarily require an explicit waiver, the Sixth Amendment clearly does.

In Faretta v California, 422 US 836; 95 S Ct 2525; 45 L Ed2d 562 (1975), this Court, applying the knowing relinquishment standard of Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1937), found a valid waiver of defendant's Sixth Amendment right to counsel at trial. However, the Court emphasized that before such a waiver could be knowing, defendant:

> "...should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.' Adams v United States, [317 US 269, 279; 63 S Ct 236, 242; 87 L Ed 268 (1942)]." Faretta v California, supra, 422 US at 835.

According to the Faretta decision then, a waiver of the right to counsel at trial requires that the defendant asserting his right to waive clearly understand the risks of proceeding without counsel and t .t this advice of risks be imparted by the trial judge. Unlike the requirements for Fifth Amendment waiver under Miranda where the suspect must only be advised of the right itself, Sixth Amendment waiver under Faretta requires comprehension of the risk of waiving the right. Thus, a much higher standard of comprehension is required to show waiver of the Sixth Amendment as opposed to the Fifth Amendment right to counsel.

Although this Court has never explicitly addressed the issue of whether this higher standard of waiver is applicable to pretrial waivers under the Sixth Amendment, the Court has indicated that the stricter standard is applicable to all waivers of the Sixth Amendment right to counsel. In Brewer v Williams, supra, the Court, as in Faretta, applied the knowing relinquishment standard of Johnson v Zerbst, supra, and stated:

> "This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or of a critical stage of pretrial proceedings." 430 US at 404.

As the above discussion demonstrates, this Court's prior Sixth Amendment decisions clearly support the Michigan Supreme Court's conclusion that a waiver of Miranda rights is inadequate to waive the greater Sixth Amendment right. Moreover, this conclusion has support in both federal and state decisions. See e.g., United States v Mohabir, 624 F2d 1140 (CA 2, 1980); United States v

Satterfield, 558 F2d 655 (CA 2, 1976); United States v Clements, 713 F2d 1030 (CA 4, 1983); State v Wyer, 320 SE2d 93 (W Va 1984); State v Sparklin, 296 Or 65; 672 P2d 1182 (1983). Contra, United States v Karr, 742 F2d 493 (CA 9, 1984); Jordan v Watkins, 681 F2d 1067 (CA 5, 1982).

The Michigan Supreme Court in this case did not undertake to define precise requirements for waiver of the Sixth Amendment or Michigan Constitutional right to counsel. The Court merely held that because the Sixth Amendment provides a greater and more fundamental right to counsel that the Fifth Amendment and because the Fifth Amendment waiver of Miranda rights is inadequate to waive the Sixth Amendment once it attaches, the Sixth Amendment right "is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart." See Petitioner's Appendix 23a.

One of the primary safeguards of the Fifth Amendment right to counsel and a direct result of this Court's landmark decision in Miranda v Arizona, supra, is the rule of Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed2d 378 (1981). In Edwards, a confession was obtained by continued police interrogation after defendant had advised the police of his desire to have counsel present. This Court found that the continued interrogation in the absence of counsel violated defendant's right to counsel under Miranda v Arizona, supra. The Court stated its holding as follows:

> "We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, supra, 451 US at 484-485.

It is entirely logical and consistent with the federal and Michigan Constitutions to extend the Edwards Fifth Amendment rule to situations implicating the Sixth Amendment right to counsel as the Michigan Supreme Court has done. The distinctions drawn by Petitioner, that Edwards should be limited to Fifth Amendment cases only and that Respondent herein did not direct his request for counsel to the police but to a judge, do not support his conclusion that the

strict requirements of Edwards cannot apply to an indicted defendant who has "only" invoked his Sixth Amendment right. As the Michigan Supreme Court stated:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished." See Petitioner's Appendix 21a.

Indeed, Petitioner's argument not only "makes little sense," it is inherently illogical. Petitioner would have this Court hold that for purposes of waiver of the Sixth Amendment, the Fifth Amendment waiver designed by the Miranda decision is adequate. However, for purposes of protection from continued police interrogation after the Sixth Amendment right to counsel has been invoked, the Fifth Amendment protections contained in the Edwards decision are not appropriate. As the Michigan Supreme Court found, this argument ignores the differences between the two separate rights and in fact, denigates the Sixth Amendment right. The Edwards rule was properly extended by the Michigan Supreme Court to situations where the accused requests counsel at arraignment.

Accordingly, it is clear that Respondent Rudy Bladel did not knowingly waive his Sixth Amendment right to counsel or his Michigan constitutional right to counsel prior to being subjected to police interrogation. Moreover, because Respondent had clearly requested that counsel be appointed, he was entitled to be protected from further police-initiated questioning particularly where Respondent had spent three days in jail following his request for an attorney without having had the opportunity to consult with an attorney. The Michigan Supreme Court decision affirming these principles and requiring that the Sixth Amendment right to counsel be at least as scrupulously honored as the Fifth Amendment right, accurately interprets both the federal and state constitutions. There is no need for this Court to review that decision.

CONCLUSION

For the foregoing reasons, Respondent respectfuly requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By: _____

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Deputy Defender

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Counsel for Respondent

Dated: April 30, 1985

No. 84-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

VS.

RUDY BLADEL,

Respondent.

REPLY BRIEF

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IN THE

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OCTOBER TERM, 1984

No. 84-1539

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

VS.

RUDY BLADEL,

Respondent.

REPLY BRIEF

ARGUMENT

I

THIS COURT SHOULD GRANT PETITIONER'S REQUEST AND ISSUE A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT SINCE THE DECISION OF THE MICHIGAN SUPREME COURT RESTED ON FEDERAL GROUNDS.

Respondent in his Brief in Opposition To The Petition claims that the decision of the Michigan Supreme Court rests on adequate independent state grounds. Petitioner disagrees.

The Michigan Supreme Court did cite the parallel state constitutional provision concerning the right to counsel, Michigan Constitution, Article I, Section 20. See *People v.*

Bladel, 421 Mich 39, 68; ____ NW2d ____ (1984). Petitioner submits that the mere citation of the Michigan constitutional provision does not establish a separate, adequate and independent state ground. The decision of the Michigan Supreme Court relied most heavily on federal constitutional law. While there was some consideration of cases which applied the state law of other states, there was no significant discussion of any application of Michigan law. It is clear that the Michigan Supreme Court based its decision upon its analysis of federal law. The citation to the Michigan constitutional provision was merely a recognition of the parallel between the Sixth Amendment and Article I, Section 20 of the Michigan Constitution. The dependency of the decision on Sixth Amendment analysis is illustrated by the following:

> We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the *Edwards/Paintman* rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const. 1963, art 1, § 20. Given the Supreme Court's holding that *Edwards* established a new "bright line" test, the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue. (*People v. Bladel, supra*, 421 Mich at 68.)

While the second sentence of the above quoted paragraph refers to both the Sixth Amendment and the state constitutional provision, Michigan Constitution 1963, Article I, Section 20, the following sentence refers only to the Sixth Amendment. It is illogical to conclude that the Michigan Supreme Court grounded its decision on an independent violation of an Article I, Section 20 right when the rules established for the protection of that right are derived exclusively from the Sixth Amendment. Clearly, the decisional basis for this case was the Sixth Amendment. The mention of Article I, Section 20 was the mere recognition that there is a "state constitutional counterpart".

Petitioner rightly cites the relevant law controlling this question, *Michigan v. Long*, 458 US 966; 103 SCt 3469; 77 LE2d 1201 (1983), that this court has authority to review the merits of a state case if:

> . . . a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion. (*Michigan v. Long, supra*, 458 US at ____; 103 SCt at 3476; 77 LE2d at 1214.)

As demonstrated by the quotation from *Long, supra*, analysis of the authority of this court to review a state court decision is not a matter of a clear dichotomy between reviewable and nonreviewable cases. Rather than coming to this court in one of two isolated boxes separated by a great expanse, cases fall according to their individual facts somewhere on a continuum ranging from the clearly reviewable to those clearly based on independent and adequate state grounds. Therefore, it is the peculiarities of each case which determine its reviewability by this court.

In *Delaware v. Prouse*, 440 US 648; 99 SCt 1391; 59 LE2d 660 (1979), this court held that it was proper to review a state court decision which cites as the basis for its ruling both federal and state constitutional provisions, as did the

Michigan Supreme Court in the case at bar. The *Delaware* court's decision revealed that the *Delaware* court would interpret the state constitutional provision automatically in accord with the Fourth Amendment. The similarity of *Prouse* to the case at bar makes Justice White's comments as appropriate here as they were in *Prouse:*

> This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' *Zacchini v. Scripps-Howard Broadcasting Company,* 433 US 562, 568; 97 SCt 2849, 2853; 53 LE2d 965 (1977).
>
> (*Delaware v. Prouse, supra,* 440 US at 653, 99 SCt at 1395).

The Michigan Supreme Court's inclusion of Article I, Section 20 of the Michigan Constitution within its opinion did not constitute a square holding that the actions violated the state constitution such that the decision of the Michigan Supreme Court was immunized from review by this court. See *Payton v. New York,* 445 US 573, 600; 100 SCt 1371; 63 LE2d 639, 659 (1980) and *Herb v. Pitcarin,* 324 US 117; 65 LE2d 459; 89 LE 789 (1945). At the very least, this court should relieve the state court from its misapprehension of federal law and free it to decide this case under state law. *Delaware v. Prouse, supra,* 440 US 653; 99 SCt at 1396.

The crux of the rationale behind the refusal to grant Certiorari where there is an independent and adequate state ground, is this court's unwillingness to grant advisory opinions. Thus, the most appropriate test of whether there is an adequate and independent state ground is to determine whether the same result would obtain in the state court regardless of this court's correction of the misapprehension

of federal law. *Herb v. Pitcarin,* 324 US at 124; 89 LE 794-795.

The history of the Michigan Supreme Court's treatment of right to counsel cases demonstrates that any decision by this court on the Sixth Amendment will have an impact on the Michigan Supreme Court's interpretation of Article I, Section 20 of the Michigan Constitution. The history of Michigan law demonstrates that Article I, Section 20 of the Michigan Constitution has been consistently read as identical to the Sixth Amendment and further that when there has been an overt attempt to give a broader interpretation of Article I, Section 20 than that given to the Sixth Amendment, such expansive reading has been rejected by a majority of the court.

In *People v. Williams,* 386 Mich 565; 194 NW2d 337 (1972), the Michigan Supreme Court addressed the question of the propriety of the trial court's refusal to grant an adjournment for the purpose of allowing a defendant to obtain new counsel where a valid dispute arose between defendant and his counsel one day prior to trial. The discussion of the importance of the right to counsel in *Williams,* showed the identity between the federal and state constitutional provisions. The court stated:

> Yet [the right to counsel] is guaranteed by the US Constitution and has been included in every constitution of this state since Michigan entered the Union. (Footnotes omitted). (*People v. Williams, supra,* 194 NW2d at 342).

Clearly, the Michigan Supreme Court in *Williams* viewed the right to counsel as a singular right identically protected by both the state and federal constitutions.

In *People v. Bellanca,* 386 Mich 708; 194 NW2d 863 (1972), the Michigan Supreme Court was confronted with

the question of whether grand jury transcripts should be made available to assist trial counsel in cross-examination. The court stated:

> These statutory provisions must be read in conjunction with the provisions in Const. 1963, Art. I § 20 that 'in every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him, . . . to have the assistance of counsel for his defense.'
>
> We read this last provision to accord a defendant the same assistance of counsel contemplated in the Sixth Amendment to the United States Constitution which was considered by the United States Supreme Court in *Coleman v. Alabama*. . . . (*People v. Bellanca*, 194 NW2d at 865.)

Clear Michigan history reveals a consistent identity between Michigan Constitution, Article I, Section 20 and the Sixth Amendment.

The historical interpretation of Article I, Section 20 has not been altered in recent years. In the instant case, *People v. Bladel*, the court's use of the terminology "state constitutional counterpart" indicates a continuance of the analysis which views the constitutional provisions as identities. See *People v. Bladel*, *supra*, 421 Mich at 68. In a case subsequent to *Bladel*, the Michigan Supreme Court faced the question of whether Article I, Section 20 should be more expansive than the Sixth Amendment. Three Justices signed an Opinion holding a more expansive reading of Article I, Section 20 over against the reading of the Sixth Amendment. *People v. Gonyea*, 421 Mich 462, 481 ____ NW2d ____ (1984). Not only did the three votes not constitute a majority of the court, but the author of the *Bladel* Opinion specifically wrote a concurring Opinion in which he

agreed with the result reached by those who would give the expansive reading to Article I, Section 20 but specifically rested his agreement exclusively on the Sixth Amendment. *People v. Gonyea*, *supra*, 421 Mich 481-482.

The dissent in *Gonyea* garnered three votes, all of which constituted votes which rejected the suggestion of giving a broader interpretation to Article I, Section 20 than that given the Sixth Amendment. *People v. Gonyea*, *supra*, 421 Mich at 43. Moreover, one of the three votes in favor of the expansive reading of Article I, Section 20 was cast by a Justice who has now left the bench.

As noted in Respondent's brief, the concurrence in *People v. Bladel*, specifically objected to the inclusion of the reference to Michigan Constitution 1963, Article I, Section 20. The concurrence stated:

> I concur in Part III-C of my brother Cavanagh's Opinion with the exception, however, that since the *Edwards/Paintman* ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const. 1963, art I, § 20.
>
> (*People v. Bladel*, 421 Mich at 75).

This statement should not be understood as indicating that Article I, Section 20 was an independent basis for the decision. This is especially true where the author of *Bladel* rejected the opportunity to give an expansive reading to Article I, Section 20 in *Gonyea*. The comment by Justice Ryan was an objection to the reference to Article I, Section 20 which was made completely out of context.

CONCLUSION

Michigan law has consistently molded Article I, Section 20 of the Michigan Constitution to fit the federal analysis of

the Sixth Amendment right to counsel. The *Bladel* decision did not rest on an adequate independent state ground. The Michigan Supreme Court was clearly compelled to construe Article I, Section 20 in conformity with its view of the Sixth Amendment. Therefore, at the very least, the Michigan Court cannot freely determine the application of state law to this question until it is freed from its misapprehension of federal law. The Writ of Certiorari should issue.

Respectfully submitted,

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Dated: May 16, 1985

(14)

No. 84-1539

In The

Supreme Court of the United States

October Term, 1984

STATE OF MICHIGAN,

Petitioner,

v.

RUDY BLADEL,

Respondent.

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PETITION FOR CERTIORARI FILED March 28, 1985
CERTIORARI GRANTED May 28, 1985

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DOCKET ENTRIES
CIRCUIT COURT

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
RUDY BLADEL

79300162FY
Criminal Case
No. 79017105FY

Judge: Russell E. Noble 18317
Prosecuting Attorney: Edward J. Grant 14272
Defendants Attorney: Adams, Goler & Williams 10042
Offense: Ct. I, II, III Open Charge of Murder
767.71 & 750.316 & 750.317

DATE	PROCEEDINGS
March 26, 1979	Attorney Appointment filed and entered
July 3, 1979	Motion to Suppress or in alternative for a Walker Hearing

---

STATE OF MICHIGAN
IN THE 13TH DISTRICT COURT
FOR THE CITY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN

vs. File 79300162FY

RUDY BLADEL,

Defendant

ARRAIGNMENT

BEFORE THE HONORABLE ROBERT CRARY, JR.
DISTRICT JUDGE

Jackson, Michigan — March 23, 1979

APPEARANCES:

Edward Grant, Prosecuting Attorney
On behalf of the People

Florence Bray R0531
Official Court Recorder
Jackson, Michigan
March 23, 1979 — at about 10:35 a.m.
(Court, counsel for the People, and all parties present)

THE COURT: At this time the Court is considering file number 79300162FY. Entitled the People vs. Rudy Bladel. That is B-l-a-d-e-l. Is that correct?

DEFENDANT: Bladel.

THE COURT: Bladel. Are you Rudy Bladel?

DEFENDANT: Yes sir.

THE COURT: May I have your date of birth please?

DEFENDANT: December 8th, 1932.

THE COURT: Thank you, sir. Mr. Bladel, I have the complaint of Detective Gerald Rand, that on or about the 31st day of December, 1978 at the city of Jackson, county of Jackson, and state of Michigan, one Rudy Bladel, did murder Charles Burton. Contrary to Michigan Statutes Annotated, Sections 28.1011, 28.548, and 28.549.

And further complaining that on or about the 31st day of December, 1978, at the city of Jackson, county of Jackson, and state of Michigan, one Rudy Bladel, did murder William Gulak. Contrary to Michigan Statutes Annotated, Section 28.1011, 28.548, and 28.549.

And further complaining that on or about the 31st day of December, 1978, at the city of Jackson, county of Jackson, and state of Michigan, one Rudy Bladel, did murder Robert Blake. Contrary to Michigan Statutes Annotated, Section 28.1011, 28.548, and 28.549. And all being contrary

to the form of the statute in such cases made and provided.

Now, Mr. Bladel, this charges you with three counts, each count of which is an open count of murder. Each count is therefore, a charge of a felony which is too serious a charge to be finally tried or disposed of by this court. This court can only hold a preliminary hearing, called a preliminary examination. At such examination, it will be the duty of the People of the state of Michigan, acting through the prosecuting attorney of this county, to bring before this court competent evidence to show, first, as to count one, that someone murdered Charles Burton, and secondly, that there is probably cause to believe that you are the one that did so. As to count two, first, that somebody did murder William Gulak, and secondly, that there is probable cause to believe that you were the one that did so. As to count three, first, that somebody did murder Robert Blake, and secondly, that there is probable cause to believe that you were the one that did so.

Now, if as to any count, both of these elements should be properly proved, then on that count, you would be bound over by this court to the circuit court of this county for trial. On the other hand, if as to any count, both of these elements should not be properly proved, then that count would be dismissed by this court. Under no circumstances could you be convicted here, because this court is only trying to determine whether a trial ought to be held.

Now, because these are very serious charges which are brought against you, you have a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you can afford an attorney, you would be very wise to retain one. If

you cannot afford an attorney, then you may petition the circuit judge of this county for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your own attorney?

DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

DEFENDANT: Yes sir.

THE COURT: All right sir. I'll place an affidavit in the file for you to make out for that purpose. Until you have a chance to talk with an attorney, the court would strongly recommend that you stand mute. That means say nothing. If you do this, the court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?

DEFENDANT: Right sir.

THE COURT: You're indicating yes. The record will show the defendant stands mute, a plea of not guilty is entered. Examination on the matter — I note the appearance of Mr. Edward Grant, our prosecuting attorney for Jackson County. Mr. Grant, you are of course aware that we need to set this within a 12 day period. The court notes 12 days from today to be the 4th of April. So I could set this for preliminary examination, as the court understands the law, for either 2nd or 3rd. I'll start with you. Does it make any difference to you, Mr. Grant, when I set this?

MR. GRANT: I'd prefer to have the 3rd Judge, if that is satisfactory.

THE COURT: All right, does it make any difference to the defendant?

DEFENDANT: No, your honor.

THE COURT: All right, April 3rd appears to the court to be within the time period set by statutes, and it appears to be a suitable time for this court. I will set this matter for examination on April 3rd, 1979, at 8:45. And now, the Court believes that this being open charges, that under the statute, I'm not able to set bond in this matter, but must remand because of the gravity of the charge made. Do you concur, Mr. Grant?

MR. GRANT: Yes, your honor. And we would ask that no bond be set in this matter.

THE COURT: I see. Mr. Bladel, I'm not trying to ignore you. You may be heard on this matter in regard to setting bond.

DEFENDANT: I have no money anyway, so it doesn't make any difference.

THE COURT: I see. Well, because of the charge, is the charge of murder, and under the normal interpretation of the statutes of Michigan, that is not a bondable offense, I at this time remand without bond.

MR. GRANT: Thank you.

THE COURT: All right, is there anything more that you wish me to pursue at this time, Mr. Grant?

MR. GRANT: I don't believe so, your honor.

THE COURT: Mr. Bladel, is there anything further you wish me to pursue?

DEFENDANT: No sir.

THE COURT: Very well. The affidavit has been placed in the file, and Officer, I see no reason why the defendant may not make that out, if he wishes, at the jail, and it may be sworn to by any suitable officer.

(The court recessed about 10:35 a.m.)

STATE OF MICHIGAN)
) ss
CITY OF JACKSON)

I, Nancy Gass, Official Court Recorder for the 13th District Court, State of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript of the proceedings recorded by Florence Bray, Official Court Recorder, in the case of People vs. Rudy Bladel, file 79300162FY on March 23, 1979.

/s/ Nancy Gass
Official Court Recorder

April 9, 1979

WALKER HEARING

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF JACKSON

The People of the State of Michigan

v No. 79-017105-FY

Rudy Bladel,

Defendant.

Had before the HONORABLE RUSSELL E. NOBLE, On July 5, 1979.

APPEARANCES:

Mr. Edward Grant
Prosecuting Attorney

On Behalf of the People

Mr. Douglas L. Williams

On Behalf of the Defendant

Barbara A. Bostrom, CSr-0183

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Jackson, Michigan

PROCEEDINGS

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MR. GRANT: I guess, the next matter before the Court is in the Walker Hearing in the same file, People versus Rudy Bladel.

If it please the Court, we will call as our first witness, Gerald Rand.

GERALD RAND

Being first duly sworn in by the Clerk, was examined and testified under oath as follows:

DIRECT EXAMINATION

BY EDWARD GRANT

Q. Would you state your full name, sir, and spell your last name for the Record, please?

A. Gerald Francis Rand, R-A-N-D.

Q. And you are presently employed, sir?

A. Yes, I am.

Q. Where are you employed at the present time?

A. City of Jackson Police Department.

Q. And what is your capacity of employment, presently?

A. I am a Detective.

Q. How long have you been employed, overall, with the City of Jackson as a police officer and a detective?

A. Nine and half years as a police officer and two and a half [3] years as a detective.

Q. And were you employed in that capacity as a detective on last New Years Eve, being December 31, 1978?

A. Yes.

Q. And did you then, within the scope of your duties come to investigate a triple homicide that took place at the train depo in the City of Jackson?

A. Yes, I did.

Q. And were you the chief investigating officer in that matter?

A. Yes.

Q. Is there anybody in the Courtroom that you came in contact with as a result of the investigation in the triple homicide at the railroad station on New Years Eve last?

A. Yes, there is.

Q. Who would that be?

A. Mr. Rudy Bladel.

Q. Where is he seated?

A. He is seated next to Mr. Williams at the counsel table.

Q. What is he wearing so we know exactly who you are identifying?

A. Blue coveralls.

Q. Okay, may the Record reflect the witness has recognized the defendant?

THE COURT: It may so reflect.

Q. (BY EDWARD GRANT:) When did you first come in contact with Mr. Bladel, through the investigation of the homicide at the [4] railroad station?

A. It would be approximately 9:30 A.M. on January 1, 1979.

Q. Where was it that you came into contact with him first?

A. At the Jackson Police Department.

Q. What, if anything, did you do with Mr. Bladel at your first contact with him on January 1st?

A. Mr. Bladel was brought to the station prior to my arrival at the station, but once it was determined that he was in fact the person that we were seeking, he was taken to the breathalizer room, which is located within the cell block and booking area of the Jackson Police Department, at which time he was advised of his rights. Our Department Form A, which outlines waiver of miranda.

(WHEREUPON, THE COURT REPORTER MARKED PROPOSED PEOPLE'S EXHIBIT NO. 1.)

Q. (BY EDWARD GRANT) Detective Rand, I show you what has been marked by the Court Reporter as People's proposed exhibit no. 1, with today's date, July 5, 1979, with a red stamped inked impression on the back. Would you examine People's proposed exhibit no. 1 and I will ask you some questions concerning the same. Have you had an opportunity to examine People's proposed exhibit no. 1?

A. Yes, sir.

Q. And do you recognize this as being one and the same form that [5] you came into contact with while you were talking with Mr. Bladel on the 1st of January, 1979?

A. Yes, I do.

Q. And how can you recognize it and identify it as being one and the same?

A. It's marked, incident no. 78-035861, dated 1-1-79 and has the time of ten thirty-nine hours, or 10:30 A.M. as a starting time for the interview and ten fifty hours as the ending time and signed by me.

Q. Okay, you recognize your own handwriting, is that correct?

A. Yes.

Q. And the items you mentioned, those were affixed to that document by yourself on the date in question, is that correct?

A. Yes.

Q. Okay. Now, what if anything, did you do with Mr. Bladel and with People's proposed exhibit no. 1, as far as informing him of what is commonly known as his miranda rights?

A. He was advised of each individual right and was asked for acknowledgement of understanding after each one.

Q. Did you give him anything to follow along with or did he have anything he could look at?

A. Yes, he was given a duplicate copy.

Q. And what, if anything, did you do as far as verbally informing him of anything, if you did anything at all, along those lines?

A. You mean go through the rights?

[6]

Q. Did you read the rights to him?

A. Yes, I did.

Q. All right. Would you read for the Court today exactly what or how you went about informing Mr. Bladel on January 1st what his rights were according to that form?

A. The Form read, verbatim from the form which states, "statement of rights. Before you answer any questions or make any statement you must fully understand your rights." The first one, "You have a right to remain silent." After reading it, he was asked if he understood that and he acknowledged that he did.

Q. Okay.

A. The second one, "Anything you say can and will be used against you in a Court of Law." Again, the acknowledgement of understanding and it was given.

Q. After each question you asked him if he understood?

A. Yes.

Q. And he acknowledged in the affirmative?

A. Yes.

Q. Did he actually say 'yes,' did he shake his head, or do you recall.

A. He just shaked his head and said, "Right."

Q. And he was following along on the other sheet you provided to him?

A. Yes.

[7]

Q. Proceed please.

A. The third one, "You have a right to consult a lawyer before you answer any questions." And, again, the acknowledgement of understanding. The fourth one, "If you can't afford a lawyer, one will be appointed for you before questioning or anytime during the questioning and if you so desire, you may stop and one will be appointed for you." Again, the acknowledgement of understanding. The fifth one, "If you answer questions or make any statement without consulting a lawyer or have a lawyer present you have the absolute right to stop at any time you wish and to make no further statement until you consult with a lawyer or have a lawyer present during the questioning."

Q. Did he indicate to you he understood that?

A. That's correct.

And he was asked if he had any questions and he was asked if he fully understood these rights and he stated that, "he did." He was then read the acknowledgement and waiver. "The above statements and rights have been read and explained to me and I have had an opportunity to ask questions concerning any rights and now fully understand what my rights are." And, I stopped at that point and advised him that was the part we just went over,

and where he had an opportunity to ask questions and also that he understood his rights and then we went on and continued. "I wish to answer questions and make a statement without first consulting a lawyer and without having a [8] lawyer present during questioning and waive my rights at this time." And, "I wish to state no promises or threats have been made to me or against me or any others." And, I simplify that portion by stating if he wishes to talk to me without a lawyer present at that time, and I haven't made any promises or threats to him or any one else to get him to answer questions, and he acknowledged the waiver, but didn't sign the form.

Q. You say he acknowledged the waiver? What was it that he said to you?

A. That he understood the last portion.

Q. Did you ask him that? If he would sign the acknowledgement and waiver?

A. I don't recall that.

Q. But, he did not sign it at any rate?

A. No.

Q. But, you do recall him making an oral expression to you that he would waive and speak with you?

A. No, he never — he just — he was just silent on the issue.

Q. Okay, and did you in fact then have some conversation with him?

A. Yes, I did.

Q. Okay, I am going to show you People's proposed exhibit no. 1 to defense counsel, Your Honor, and we ask that that be entered as People's exhibit no. 1 for the Walker Hearing.

[9]

MR. WILLIAMS: No objection.

THE COURT: There being no objection, People's exhibit 1 is admitted.

MR. GRANT: Thank you.

Q. (BY EDWARD GRANT) Would you relate to the Court, then the nature of the conversation, if any, that you had with Mr. Bladel at that time, on January 1st, 1979?

A. He was questioned as to his means of arriving in Jackson and he stated that he came by bus and he was asked by what bus and he stated the Greyhound bus and he was asked how long he had been in town and he advised two or three days. I asked him to be more specific and he says, "two or three days, I am not sure." He was asked where he had stayed and he advised that he stayed at the Adams Hotel and he was questioned as to his whereabouts on the night of the shootings and he stated that, "You know, he was just in his room." He was asked if he was at the depo and he stated, "No," and he was asked if he had in fact shot the three people at the depo and he denied knowledge of that. At which point, he told me that I wasn't telling him anything and wasn't making sense and I informed him that he wasn't saying too much to me either. At which time, he said, "He knew that, and didn't plan on saying anymore," so the interview terminated at that point.

Q. Okay, did you have a contact with Mr. Bladel after the conversation that you related for us on January 1st, 1979?

[10]

A. Yes, in the afternoon of January 2nd, 1979.

Q. All right, and where did that contact take place?

A. That also took place in the breathalizer room at the Jackson Police Department.

Q. And who was present at that time?

A. There was Mr. Bladel and this investigator and yourself.

Q. Did you do anything as far as advising of rights of Mr. Bladel at that time prior to asking him anything?

A. He was further advised of his rights as I stated previously and no form was prepared at that time.

Q. You did advise him orally of the same rights that you read from the form a little while ago, is that correct?

A. Yes, I did.

Q. And, did he acknowledge that he understood his rights at that time?

A. Yes, he did.

Q. And did he indicate to you in any way that he would go ahead and speak with you?

A. Yes, he did.

Q. Okay, and what, if any, conversation did you have with Mr. Bladel and myself at that time?

A. Okay, in that particular interview he was again talked to about the night of the shootings and was asked if he was in the area of the train depo and initially he stated he had gone to the Jackson Coney Island for a meal and that was the closest [11] he had gotten to the depo. Later in the interview he was asked if his finger prints would be found in that room for any purpose and he stated, "no," but then he said, "On second thought that he had gone there and after leaving the Coney Island, and that he had to use the bathroom and he knows that the training room in the depo, knows the location of them, as all the depos he is familiar with have the locker room and bathroom facility," so this was the reason he went there. And, he was asked why he didn't use the bathroom at the Coney Island. He says, "He didn't know they had one there." We asked him as far as the shooting themselves and he denied shooting anybody. We asked him in regard to the weapon, if he had in fact placed the weapon in the suitcase that he was carrying that night, and his reply was, "Weapon, you got a weapon?"

Q. And, did you have a weapon at that time?

A. No, we did not.

Q. Okay, and did you mention that to him?

A. That's correct.

Q. And was there any further conversation then about him either being in that training room on other occasions or having any contact with the three deceased?

A. He was further asked as far as the training room, if he had been in there on the day of the shootings and he

did state at that time that he had gone back on the Sunday or the day [12] of the shootings, the 31st of December to use the bathroom again. He was again asked about the shootings and he denied the fact that he had shot anybody. He was then told by me that one of the victims, which being Mr. Burton, that he had been left with a widow and 4 small children at home and his statement was, "that they didn't think about that when they took our jobs" and we questioned him further and at which time, he was asked the question: how long this was going to go on, and he stated that, "It would go on as long as it took." He was asked why he was in town and he stated, "He was here looking for a job," and he was questioned as to the looking for a job on a Holiday week-end and he stated that he had planned on staying until January 2nd.

However, he had already seen a news article in the Jackson paper on News (sic) Year morning, being January 1st and saw his name and was being sought in the connection with the shootings, so he felt that he better leave town at that point. As far as the work that he was seeking we asked him if he had put any applications in and he stated, "No," and we asked him if he knew of any place he intended on applying for a job and he stated, "no, that he would use the newspaper to find a place."

Q. Did you have any discussion with him or conversation with him as to possible motives for these three people that had been shot to death?

[13]

A. Yes, it was discussed as to his . . . well our knowing about him or finding out about him and the reason that he was a suspect and that he had had prior problems

with the railroad and in which time he advised us of the union and management of the railroad giving their jobs away in Elkhart and he was asked to . . . we were discussing the railroad situation and he had updated us as to the contract that existed down there in 1959 and that 40% of the jobs in Elkhart were given away to Michigan trainmen and I believe he called it 40% equity of the jobs in the Elkhart yards as they closed the Niles yard in 1959 and in discussing that with him he seemed to be hostile toward the Michigan trainmen because they had come into the Elkhart area and absorbed a lot of the jobs in the Elkhart yards. And, further he advised that I believe in 1968 that the equity increased from 40% to 48% of the jobs, so there was further jobs lossed (sic) in Elkhart for the Indiana trainmen.

Q. Did he have any conversation with you or did you ask him any questions about how that had affected his job?

A. I did, and I have difficulty recalling. It seems that Mr. Bladel advised that he was a fireman because he was in a area where he was doing some engineering also and it caused him not to be able to engineer because they had brought engineers in from Niles.

Q. He mentioned to you that he had lost his job because of this [14] agreement?

A. No, because of the agreement he didn't lose his job, but he went from a continual employment situation to where he was not getting the opportunity to work as often.

Q. Was there any conversation as you recall that Mr. Bladel mentioned to you that he had been in the ticket office in the depo also on New Years Eve, around 6:30 or a quarter to 7:00?

A. He was asked if he was in the passenger portion of the depo and I don't recall him stating a time, but he indicated that a conductor on a train that was pulling out of the depo had lost his hat and he had picked up his hat and walked to the passenger area and not seeing anybody around he sit the hat down, hoping that the conductor would find his hat on the way back through.

Q. And did he indicate to you where he was when he noticed the conductor's hat blow off the conductor's head?

A. He was on the walkway. I believe he stated he was just leaving the training room after one of his restroom stops.

Q. Was there any further conversation then on that date, being January 2nd, that you can recall that you have not testified to?

A. Not that I can recall at this time.

Q. Okay, and how was that interview then terminnated, did Mr. Bladel say he wished not to talk any further or how do you recall that being terminated?

A. No, it seems Mr. Bladel indicated that he had to use the rest-[15]room and at that point I had no further questions for him and it was terminated, I believe by myself.

Q. Okay—he answered all of the questions that you put to him on that date, did he not?

A. Yes.

Q. He didn't ask for an attorney at any time did he?

A. No.

Q. Nor on January 1st?

A. No.

Q. Did there come any time after January 2nd that you came into contact again with Mr. Badel and had some conversation with him?

A. Yes, I did. It was after his arrest.

Q. Would that be March 22, 1979?

A. Yes, it would have been.

Q. Okay. Could I have this marked as People proposed exhibit no. 2?

(WHEREUPON, THE COURT REPORTER MARKED PEOPLE'S PROPOSED EXHIBIT NO. 2.)

(BY EDWARD GRANT) Now, Detective Rand, I show you what's been marked by the Court Reporter as being People's proposed exhibit No. 2, again, dated July 5, 1979, by the red stamp and inked impression on the back. Would you examine that please, and then I would ask you questions concerning the same.

[16]

Have you had a chance to examine People's proposed exhibit no. 2?

A. Yes.

Q. And does that look familiar to you as something that you came into contact with on March 22, 1979?

A. Yes, it does.

Q. And how can you identify people's propsed exhibit no. 2 being one and the same item you came into contact with on March 22, 1979?

A. Again, it's marked incident 78-035861. It's dated 3-22-79 as the commencing time of 2125 hours or 9:25 P.M. and a ending time of 2346 hours or 10:46 P.M.

Q. You recognize that as being your handwriting that you affixed on the document in question on March 22nd?

A. Yes it's also affixed with my signature and identification number.

Q. Okay. Now, where was it that you came into contact with people's proposed exhibit no. 2 and Mr. Bladel on March 22, 1979?

A. It would have been in the interview room in the detective bureau at Jackson Police Department.

Q. Okay, and the person then that you came into contact with is the same person you already identified as having previously come into contact on the first and second of January?

A. Yes.

Q. Same person presently in the Court seated at the counsel table you already identified?

[17]

A. Yes.

Q. Did you again have any prior conversation advising him of anything on March 22nd?

A. He was again advised of his rights or statement of rights per our form A.

Q. Would you go through that again for us just as you recall doing that on the 22nd of March with Mr. Bladell?

A. He was advised this was a statement of rights and before you answer any questions or make any statement you must fully understand your rights. First one, you have a right to remain silent. He was asked if he understood that and he indicated to the affirmative. He would use the word, "right." Second one, anything you say can and will be used against you in the Court of Law. Again, the acknowledgement of understanding and he indicated with the word, 'right.' Third, you have a right to consult with a lawyer before you answer any questions or make any statement and have him present during questions or before making any statement. Again, the acknowledgement was requested for understanding and he indicated right. Four, if you can't afford a lawyer one will be appointed for you before questioning or any time during questioning, if you so desire, and again, the acknowledgement for understanding and he indicated, 'right.' Five, if you answer questions or make any statement without consulting with a lawyer or having a lawyer present you still have the absolute right to stop [18] at any time you wish and to answer no further questions or make no further statements. You may at any time you wish stop answering questions or make any statement or have a lawyer present during questioning. Again, he was asked if he understood and he indicated right, and he was asked if he had any question regarding his rights and he answered, "no."

Q. Then he was asked—

A. He was asked if he fully understood and he stated, "right," and he was then read, "The acknowledgment of rights have been explained to me and I have had an opportunity to ask questions concerning my rights and now fully understand what my rights are." Again, that portion was explained and he was asked if he had any questions and he stated, "No, he understood that part" and does he wish to answer questions or to make a statement without first consulting a lawyer or without having a lawyer present during questioning, and I waive my rights and I wish to state no promises or threats have been made to me or against me or any others, and again, he was advised in simple form that that stated he was willing to talk to me without a lawyer present, and that I hadn't made any threats to him or anyone else.

Q. You put that in your own words when you explained that to him?

A. Yes.

Q. Did he seem to be paying attention to what you were saying?

A. He seemed to be.

[19]

Q. Did he acknowledge on this waiver and this form and sign it?

A. Yes, he did.

Q. And that was done in your presence?

A. Yes.

Q. And is this your signature, as it is and as you saw him affix his signature also?

A. Yes.

Q. And there is a signature under witness, who is that?

A. That is David Kacki, and he is a sergeant with the Elkhardt Police Department.

Q. This interview was at what time?

A. 9:25 P.M.

Q. And Mr. Bladel indicated he would speak with you?

A. Yes.

Q. He didn't request an attorney?

A. No, he did not.

Q. And did you in fact have some conservation with him?

A. Yes, I did.

Q. Would you state to the Court the nature of the conversation you had with Mr. Bladel at that time?

A. In the interview, we started right off and we had recovered a shotgun and we had found that the gun was purchased by Mr. Bladel.

Q. You told him these facts, is that correct?

A. Yes, I did. Okay. He was advised that the gun was at the [20] Michigan State Police Crime Lab and the scientific laboratory was doing tests first and had the casings from the depot with the ejector marks and primer marks and these were all being prepared at the present time and asked him to make a statement and he indicated as far as the gun, "Well, I got rid of the gun." And, we

further questioned him about getting rid of the gun and he stated, that "He had got rid of it a long time ago because he could get 2 years for having that gun."

Q. Did he indicate to you how he got rid of the weapon in question?

A. After several other questions pertaining to the same thing and getting the same responses indicated he had thrown it away down in Elkhardt over a year ago in a field.

Q. Was there any conversation additional between you and Mr. Bladel?

A. In regard to the weapon he was told that or just a statement by me that he had—I didn't believe that he had thrown the gun away down there and that he had thrown it away up here. And, he stated, "no he had thrown it away down there and whoever found the gun down there must have brought it up here and killed those people and got rid of it." And, I said, "His name is probably Rudy Bladel," and he indicated, "there might be two of them."

Q. There might be two Rudy Bladel's?

A. Yes.

[21]

Q. So you had confronted him with the fact you had the ATF form indicating his signature of that gun by serial number?

A. Yes.

Q. Was there any further conversation that you recall at that time?

A. Got into the fact that he had been in the depot on two previous days at which time he stated, "No, he

had only been in there on Saturday and he hadn't been anywhere near the depot on Sunday," and he was challenged on that from a prior interview on January 2nd where he had indicated he was in both days and he was again asked if he had gone to the depo and shot those guys and put the gun in his suitcase and carried it away in that fashion and he indicated again, and said, "No, he says I got rid of that gun over a year ago," and he wouldn't give us a direct answer on that he just would go back to the statement that he had thrown the gun away down in Elkhardt.

Q. How do you recall that interview being terminated?

A. The interview terminated on just mere silence on on the part of Mr. Bladel. He just ceased to answer questions or just talk at all so we terminated at that point.

Q. How long was this interview, overall?

A. This interview was one hour and twenty-two minutes, overall.

Q. And at that time that you are interviewing, did Mr. Bladel ever ask to use the washroom or did you deny him access to any toilet facility or food or drink that he may have requested from you?

[22]

A. He asked to use the toilet facility and he was taken there and when he finished that, then he was taken back to the interview room and there was a drinking fountain outside the door and I believe he got a drink coming back to the room and he never requested anything after that.

Q. Okay, and of course, you had prior to interviewing him at City Police brought him back from Elkhardt, Indiana and—had you not?

A. Yes.

Q. Were you familiar with whether or not he had had supper prior to the interview?

A. Mr. Bladel indicated he was hungry out of town and we stopped at Wendys Hamburgs in Elkhardt and purchased a hamburg, french-fries and large coke, which he consumed on the way back.

Q. And it takes approximately how long from Elkhardt to the City of Jackson?

A. An hour to an hour and forty-five minutes.

Q. Prior to your bringing him back to Jackson, did you have an occasion in that afternoon to be present in the Elkhardt Court where Mr. Bladel waived his extradition?

A. Yes.

Q. And he also waived his attorney at the extradition hearing, did he not?

A. Yes.

Q. He did not on the date you spoke with him, being March 22nd, [23] asked to have an attorney at any time, did he?

A. No.

Q. Any of the things that you told him concerning finding of the gun and tests being conducted, did you lie about any of these things or did you just give him the facts

as you understood them to be, just the facts at the time you were relating to him?

A. I gave him the facts as they were known to me.

Q. That was a Thursday was it not?

A. Yes.

Q. And were you present when he was arraigned in District Court?

A. Yes.

—Okay, thank you.

MR. GRANT: I have no further questions at this time, Your Honor. We would ask that People's proposed exhibit no. 2 be entered as People's exhibit no. 2. I show that to defense counsel.

MR. WILLIAMS: No objection.

THE COURT: There being no objection, People's exhibit no. 2 is admitted.

MR. GRANT: Thank you. I have nothing further of Detective Rand at this time, then.

THE COUPT: Cross examination, Mr. Williams?

MR. WILLIAMS: If it please the Court.

CROSS EXAMINATION

[24]

Q. (BY MR. WILLIAMS) Now, Detective Rand, how many times in all that you can recall did you question Mr. Bladel?

A. Three, I believe.

Q. And on January 1st, 1979 how long did you question him?

A. 11 minutes.

Q. I believe you stated that he did not sign the waiver?

A. No, he did not.

Q. Well, did he ask for a lawyer?

A. No, he did not.

Q. Now, what is the standard operating procedure in the police department when a person does not sign the waiver?

A. Standing operating procedure is the investigator or whoever it may be, the refusal to sign a waiver does not necessarily mean refusal on the part of the person to talk. If he would have indicated I have nothing to say to you, I want to talk to a lawyer or whatever, I would have walked out of the room and wouldn't have said nothing else, but it was not indicated to me so he was asked questions at that time.

Q. Did you think it was odd that he wouldn't sign the waiver?

A. He was asked to sign the waiver. He never came out and says, no I will not sign the waiver. He just looked at the form and didn't sign it.

Q. He didn't sign it?

A. Right.

Q. And at that time you took it as a voluntary waiver because he [25] didn't sign it?

A. He acknowledged understanding his rights and he acknowledged that he understood the waiver portion of the rights and he never gave me a negative response as to talking to me or not talking to me at the time.

Q. Did you ask him why he didn't sign the waiver?

A. No, I don't believe I did.

Q. I believe you stated that you talked to him again and in the afternoon on January 2nd, is that correct?

A. Yes.

Q. And, at that time did you present him with a waiver to sign?

A. No, I did not.

Q. Why didn't you present him with a waiver to sign?

A. I advised him of his rights verbally and it was a matter of just talking to him again, subsequent to the first interview.

Q. But, he wasn't presented a waiver to sign, is that correct?

A. No, he was not.

Q. Did he ask for an attorney at that time?

A. No, he did not.

Q. And how long did you talk to him on January 2nd?

A. Approximate time on January 2, I would have—I would say an hour minimum, and an hour and ten minutes as a maximum.

Q. How long did you talk to him on January 1st?

A. 11 minutes.

[26]

Q. Now, calling your attention to March 22, I believe you stated you talked to him an hour and twenty-two minutes, is that correct?

A. That's correct.

Q. And, at this time he did sign a waiver, is that correct?

A. Yes.

Q. And, did he ask for an attorney at that time?

A. No, he did not.

Q. But, I believe you did indicate that the interview terminated because he just went into silence, is that correct?

A. That's correct.

Q. Did you take that to mean he didn't want to talk anymore?

A. That's correct.

Q. Well, you stated that you were present at the arraignment, is that correct?

A. Yes.

Q. And who was that in front of?

A. Judge Justin. No, I take that back, Judge Crary.

Q. Fine, and at that time did you recall Judge Crary asking Mr. Bladel if he wanted an attorney to represent him?

A. Yes, I do.

Q. And do you recall Mr. Bladel stating that he did not have the funds for an attorney and that he was broke, in otherwords?

A. As part of his answer, I believe, yes.

Q. And do you recall Judge Crary stating that he would appoint an attorney to represent him?

[27]

A. Yes.

Q. Now, that was—excuse me, strike that— that was March 23, is that correct?

A. Yes.

Q. And when was the next time that you questioned Mr. Bladel?

A. I did not.

Q. So, you questioned him on January 1st, January 2nd, and March 22nd?

A. Yes.

Q. And that was the sum total of your questioning?

A. Yes.

Q. You did have knowledge that Mr. Bladel had requested an attorney at the arraignment?

A. In part.

Q. And did you have an occasion to talk to anyone else on the police department that may have connection with Mr. Bladel?

A. Would you be more specific?

Q. Was there anyone else that you talked to on the police department that would be questioning Mr. Bladel?

A. I had no idea of anybody going to question Mr. Bladel. I talked to all my fellow workers on the police department.

Q. Did you inform any of the other fellows on the police department that Mr. Bladel had requested an attorney at the arraignment?

A. I don't recall.

[28]

Q. Was there anyone else with you when he requested an attorney at the arraignment?

A. Somebody else was with me. I am having difficulty recalling who.

Q. Now, what is the standard procedure when you have a person that you are questioning? I might ask you —all right. Is this exclusively your case at that time?

A. I am the chief investigating officer. It was exclusively my case as far as the investigation is concerned, but that's not to keep anybody else from being involved in the investigation in a manner that as the investigator that is handling the case, because of the magnitude of the case.

Q. Now, if anyone else would question Mr. Bladel would they first come to you and inform you of such?

A. Normally, yes.

Q. And, in this case did anyone else come to you and inform you that they were going to interrogate Mr. Bladel?

A. Yes.

Q. And who was that?

A. That was Sergeant Wheeler.

Q. Did anyone else come to you and inform you that they would assist in the interrogation of Mr. Bladel?

A. Sergeant Wheeler indicated that he and Lieutenant Lowe were going to go up and talk to him.

Q. And what information did you give to Sergeant Wheeler or Lieutenant Lowe as far as this case was concerned?

[29]

A. Information? Well, they were being supervisory officers. Sergeant Wheeler is my immediate supervisor and Lieutenant Lowe is the commander in charge of the entire detective bureau and they had maintained status on this complaint and they were aware of everything that I was aware of.

Q. Were they present at the arraignment?

A. I believe Sergeant Wheeler was present at the arraignment. I can't recall if Lieutenant Lowe was there or not. I believe not. I don't believe he was up there for the arraignment.

Q. Did you inform either Sergeant Wheeler or Lieutenant Lowe that Mr. Bladel had requested an attorney?

A. Specifically, tell them that, no, I did not.

Q. Did you inquire as to whether Mr. Bladel talked to an attorney?

A. I'm sorry?

Q. Did you inquire at any time whether Mr. Bladel had talked to an attorney after he requested it?

A. Did I inquire?

Q. Yes.

A. No, I did not.

Q. Do you know whether or not an attorney was appointed on the 23rd?

A. No, I have no knowledge of an appointment that was made at that time or not.

Q. Did you acquire an acknowledgement subsequent to the 23rd that [29] Mr. Bladel had been appointed an attorney?

A. You mean after the 23rd?

Q. Yes.

A. Yes, I did.

Q. And when was that?

A. That would have been the afternoon of the 26th.

Q. And how did you come about that knowledge?

A. I believe I came to that knowledge or obtained that knowledge through the prosecutor's office.

Q. And to your knowledge after the 22nd did anyone else question Mr. Bladel?

A. After the 22nd?

Q. Yes.

A. Sergeant Wheeler and Lieutenant Lowe did on the 26th.

Q. Did anyone else question him on the 23rd to the best of your knowledge?

A. To the best of my knowledge, no.

Q. Did anybody question him on the 24th?

A. Not to my knowledge.

Q. Did anyone question him on the 25th?

A. Not to my knowledge.

Q. And to the best of your knowledge when was he questioned on the 26th?

A. Sometime between 9:00 and 1:00 in the afternoon.

Q. And how long was he questioned?

[30]

A. I was not present. I can't testify to that.

Q. Thank you.

MR. WILLIAMS: I have nothing further.

THE COURT: Anything further, Mr. Grant?

MR. GRANT: No, sir.

THE COURT: You may step down.

MR. GRANT: Sergeant Wheeler would you step up please and be sworn in by the Clerk?

RICHARD WHEELER

BEING FIRST DULY SWORN IN BY THE CLERK AT 10:12 A.M. WAS EXAMINED AND TESTIFIED UNDER OATH AS FOLLOWS:

DIRECT EXAMINATION

BY EDWARD GRANT

Q. Would you state your full name please, and spell your last name?

A. Richard Wheeler, W-H-E-E-L-E-R.

Q. And you are presently employed, sir, Mr. Wheeler?

A. Yes, sir.

Q. And where do you work and what capacity?

A. Jackson Police Department, Seargeant.

Q. How long have you been so employed with the City of Jackson Police Department as an officer?

A. 25 years.

Q. And were you so employed on March 26th of 1979?

A. Yes, sir, I was.

[31]

Q. And is there anybody in the Courtroom at this time that you came into contact with in your official capacity as a Sergeant with the City of Jackson Police Department?

A. Yes, sir.

Q. Who would that be?

A. Rudy Bladel, sitting just to the right of the defense counsel.

Q. And what is he attired in here today?

A. Blue coveralls.

Q. May we have the Record reflect again that Sergeant Wheeler has identified the defendant, Rudy Bladel?

THE COURT: It may so indicate.

Q. (BY EDWARD GRANT) Where did you come into contact with him?

A. Jackson County Sheriff's Department.

Q. Was anybody with you?

A. Lieutenant Lowe.

Q. Specifically, why in the Jackson Police Department did you come into contact with Mr. Bladel?

A. In the office of the Sheriff.

Q. Up on the second floor?

A. Yes, sir.

Q. Okay, could I have this marked as 3 please?

(WHEREUPON, THE COURT REPORTER MARKED PEOPLE'S PROPOSED EXHIBIT NO. 3.)

[32]

Q. Sergeant Wheeler I am going to show you what has been marked as People's proposed exhibit no. 3 by the red stamp and inked impression marked on the back of said document. Would you look at people's proposed exhibit no. 3 and carefully, please, and I would ask you some questions concerning same?

A. Yes, sir.

Q. Do you recognize people's proposed exhibit no. 3 as being a document that you came into contact with on the 26th of March in your investigation of the triple homicide at the railroad station?

A. Yes, sir, I do.

Q. How do you recognize this as being one and the same document that you came into contact with?

A. Incident 78-3035681, dated 3-22-79 at 12:42 P.M. with my signature affixed to it.

Q. You recognize those as being your writing that you affixed to the document on the date in question?

A. Yes, I do.

Q. Did you do anything then with People's proposed exhibit no. 3 in connection with Mr. Bladel?

A. Yes, sir.

Q. What did you do?

A. I gave Mr. Bladel a copy. Lieutenant Lowe had a copy and a statement of rights was read to Mr. Bladel.

Q. All right, and would you read to the Court how you read to [33] Mr. Bladel on the date in question and put anything that he said to you by Mr. Bladel, if he made any statements showing acknowledgement of what you were saying?

A. Yes, sir. Before you answer any questions or make any statement you must fully understand your rights. No. 1. You have a right to remain silent. I at this time asked Mr. Bladel if he understood no. 1 and he stated yes. No. 2, anything you say can and will be used against you in a Court of Law. Again, I asked Mr. Bladel if he understood no. 2 and he stated, yes. You have a right to consult with a lawyer before you answer any questions or make any statements and to have him present during the questioning or while making a statement. Again, Mr. Bladel was asked if he understood no. 3 and he stated that he did. If you can't afford a lawyer one will be appointed for you before questioning or any time during questioning and if you do so desire. Again, Mr. Bladel was asked if he understood no. 4 and he stated that he did. No. 5, if you answer questions or make any statement without consulting a lawyer or having a lawyer present you will still have the

absolute right to stop any time you wish and to answer no further questions or make any further statement or you may at any time if you wish to stop answering questions or make any statements until you consult a lawyer and you may have a lawyer present during the time of the questioning. I asked Mr. Bladel if he under-[34]stood no. 5, or had any questions and he stated he understood no. 5 and he had no questions. The acknowledgement of waiver was read in full to him. The above statement of my rights have been read and explained to me and I have an opportunity to ask questions concerning my rights and I now fully understand what my rights are. I wish to answer questions or to make a statement without first consulting a lawyer or without having a lawyer present during questioning and I waive my rights to remain silent in the presence of the lawyer at this time and I wish to state not promises or threats have been made to me or against me or any others. Also, Mr. Bladel was asked at this time if he understood what that meant and did he have any questions or did he want an attorney present at this time and he said he did not and understood this.

He was asked if he would wish to sign the waiver at which time Mr. Bladel signed this particular waiver.

Q. And that appears on People's proposed exhibit no. 3 does it not Sargeant Wheeler?

A. Yes, sir.

Q. And that signature was affixed there in your presence as well as Lieutenant Lowe's presence?

A. Yes, sir.

Q. Now, Lieutenant Lowe's name only is on the document under witness is that correct?

A. Yes, sir.

[35]

Q. Was that affixed in your presence?

A. Yes, sir.

Q. And the only other writing on there is the police and it says Jackson County Police Department—Sheriff's office?

A. Yes, sir.

Q. You put that in there by yourself?

A. No, that was by Lieutenant Lowe and the rest was mine.

Q. Did Mr. Bladel at any time ask to have an attorney present?

A. No, sir.

Q. To contact an attorney?

A. No, sir.

Q. Did he indicate to you that he was willing to speak with you?

A. Yes, he did.

Q. And would you relate for the Court then what if anything further took place after the People's proposed exhibit no. 3 was executed as you have testified?

A. Well, we started out with questioning Mr. Bladel about how he was being treated at the County Jail which he stated was okay. His education which he stated that he was or went through the 8th grade and then some sort

of school in Chicago where he completed, I think his 12th grade education or equivalent to. His railroad work, what type of a job he had. His problems that he had with the railroad which he explained to us about losing a job and so forth and finally it was brought out that the reason we were there was to [36] bring forth the evidence that we had picked up and that was in Lansing that we had found the gun that had been involved in a slaying down at the depo, that the gun was traced with effort back to him. That some trace evidence was up in Lansing and that there was green flecks found in his suit case and green flecks found on the shotgun and so forth.

Q. Okay, and did any of the things you told him or any of those were they made up by you or false?

A. No, sir, they were the truth.

Q. These were all of the facts as best you knew them at that time?

A. Yes, sir.

Q. All right and did you then have any further conversation with Mr. Bladel after confronting him with the finding of the shotgun and that it had been analyzed (sic) and did you also show him the AFT form, the firearms?

A. Yes, sir, we had the zeroxed copy of the AFT form.

Q. And you showed it to him?

A. Yes, sir.

Q. And did you then have any further conversation with him?

A. He admitted that the gun was his, but at first he said he threw it away, but because he knew if he was

caught with it he would go back to prison, but we kept talking and finally Rudy leaned forward in the chair and said, "You got me, what [37] do you want to know?"

Q. What took place?

A. So, we said, "What happened Rudy," and he says, "Well, on that particular night I left the Adams Hotel about 6:15 P.M."

Q. What night was he speaking of?

A. New Years Eve, about 6:15 P.M., and walked to the depo and went up on the ramp, put a shotgun together, went inside, shot the one man sitting in the chair facing, turned and shot the other man sitting at the picnic table and put another shot in each of the other bodies and went on out the front and shot another man in the head and left, walking southerly across the railroad tracks.

Q. Did he indicate to you what he did with that shotgun or how he was, if he was able to conceal it while he was approaching the hot air room?

A. Yes, sir he said he took it out of the suitcase and put it together.

Q. Did he indicate to you what he did or where he went after he left the depo then after shooting these three men?

A. Yes, sir, he did, he said he went back to the hotel.

Q. And was there any further conversation with him at that time concerning murder or other evidence?

A. Yes, sir, he said that he heard over the radio that they were looking for a ex-railroad man from Elkhardt and at the time [38] he figured it was him that they were

looking for and he stated he took the gun and wrapped it in a coat or a garment and walked west to the park and hid the gun or got rid of the gun, was the way it was.

Q. Was there any further conversation that you recall?

A. Yes, sir, we asked him if he would write out a confession for us and he stated that he would.

Q. Okay, and was he advised of any further rights at that time?

A. Yes, he was advised of the form C rights that is on the confession.

Q. Who is that done by?

A. That was done by Lieutenant Lowe.

Q. Okay, thank you.

THE COURT (sic): If it please the Court, I am going to show defense counsel People's proposed exhibit no. 3 and ask that that be admitted as People's exhibit No. 3.

MR. WILLIAMS: No objection.

THE COURT: Being no objection, People's exhibit no. 3 is admitted.

Q. (BY EDWARD GRANT) Was there any conversation with Mr. Bladel at that time while you were there interviewing him concerning why he shot these 3 people?

A. That Michigan railroad men had caused him to lose his job and that he didn't like them.

Q. Did he indicate to you that he knew personnally any of these three men?

[39]

A. No, sir.

Q. He did not know or he didn't indicate to you?

A. He didn't indicate.

MR. GRANT: I have nothing further at this time, Your Honor.

TTHE COURT: Cross examination, Mr. Williams?

MR. WILLIAMS: If it please the Court.

CROSS EXAMINATION

BY MR. WILLIAMS

Q. Sergeant, were you present at the arraignment?

A. No, sir.

Q. Did you have any knowledge of the—that the defendant had been arraigned?

A. No, sir.

Q. Did you have any knowledge of the—that the defendant had been arraigned?

A. Yes, sir.

Q. Did you have knowledge that he had requested an attorney?

A. No, sir.

Q. Did you inquire as to whether he had requested an attorney?

A. Yes, sir.

Q. And what was the answer when you inquired?

A. Who he inquired from or what was the answer?

Q. What was the answer?

A. Why, yes, that he had requested an attorney.

[40]

Q. Then you knew that he had requested an attorney?

A. He told us he did.

Q. He did?

A. Yes, sir.

Q. And when did he tell you he had requested an attorney?

A. Right after he—I read him no. 5.

Q. And what was no. 5?

A. If you have any questions to make any statements without consulting a lawyer or have a lawyer present you will still have the absolute right to stop any time you wish and make no further questions or no further statements or you may at any time you wish stop answering questions or make any statements until you consult a lawyer or have a lawyer present during the questioning.

Q. And at that time he told you he had requested an attorney?

A. Yes, sir.

Q. And did you cease the questioning at that period?

A. No, sir.

Q. Did you ask him whether he wanted to consult with his attorney?

A. Yes, sir.

Q. Did he tell you that one had been appointed or only that he had requested an attorney?

A. He requested one and didn't know whether he had shown up and he said he didn't need one and he intended on pleading guilty.

[41]

MR. GRANT: He intended on pleading guilty?

THE WITNESS: That was later on.

Q. (BY MR. WILLIAMS) How much later was this later on?

A. After he give us a statement.

Q. After he had given the statement?

A. Yes.

Q. But, prior to the statement?

A. He stated he was specifically asked by Lieutenant Lowe whether he wanted an attorney present at this time and he stated no.

Q. But, he did tell you that he had requested an attorney?

A. Yes, sir.

Q. And one hadn't shown up?

A. Well, whether one hadn't shown up or he didn't know whether he had been appointed or not. Let's put it that way, he said he had requested one, but didn't know whether one had been appointed or not.

Q. What was his state of mind at the time you questioned him?

A. State of mind?

Q. Yes.

A. Very calm, calculated when we would ask questions, he would sit back and think what he was going to say.

Q. What time did you question him?

A. What time? It was 12:42 P.M. on the 26th of March.

Q. And how long did you question him?

[42]

A. How long? Roughly an hour and ten minutes from beginning to end, that's total time.

Q. Was this the first time you had questioned Mr. Bladel?

A. Yes, sir.

Q. And this was your first contact with him?

A. No, sir.

Q. When had you contacted him?

A. My first contact with Rudy Bladel was when we arrested him in Elkhardt, Indiana.

Q. When then you were with Detective Rand?

A. Yes, sir.

Q. Did you talk to him from Elkhardt?

A. No, sir, I never had words with Rudy Bladel before our interview on the 26th.

Q. Do you know who went to the arraignment?

A. I have no idea I am sure Detective Rand did, but I can't say that truthfully, so I really can't say. I was in Elkhardt.

Q. At any time did you attempt to ascertain whether or not an attorney had been appointed for Mr. Bladel?

A. No, sir.

Q. Did this become of concern to you after you read him his rights and that he reported to you that he had requested an attorney?

A. No concern whatsoever.

Q. I have nothing further.

[43]

REDIRECT EXAMINATION

BY EDWARD GRANT

Q. Now, your testimony is that he did mention to you that he had asked for a Court apponited attorney and you asked him at that point if he wanted an attorney present?

A. Yes, sir.

Q. And he specifically said to you at that time?

A. I do not need one.

Q. He did not wish an attorney present?

A. Yes, sir.

Q. And he would speak to you without his attorney?

A. Yes, sir.

MR. GRANT: I have nothing further of this witness.

RECROSS EXAMINATION

BY MR WILLIAMS

Q. I believe you stated that he stated that he did not need one after the questioning?

A. No, sir, he said he did not need one after I advised him of his rights. We asked him if he wanted an attorney present and he said no, I do not need one.

Q. But, he did inform you prior to that that he had requested an attorney?

A. Yes, sir.

MR. WILLIAMS: I have nothing further.

[44]

FURTHER REDIRECT EXAMINATION

BY EDWARD GRANT

Q. Your testimony was, was it not, that he had mentioned later on that he was going to plead guilty anyway?

A. Yes, sir.

Q. That's the portion that he said, sometime later?

A. Yes, sir.

MR. GRANT: I have nothing further.

MR. WILLIAMS: Nothing further.

THE COURT: Did you understand at any time, Mr. Wheeler that the request for attorney was being made to you at the time of the questioning; at that time?

THE WITNESS: You mean did he request an attorney to me?

THE COURT: Yes.

THE WITNESS: No, sir, he never did.

MR. GRANT: It was just the opposite, he said he did not wish—

THE WITNESS: It was just the opposite, he said he did not want one.

THE COURT: Thank you.

RONALD LOWE

Being first duly sworn in by the Clerk at 10:30 P.M. was examined and testified under oath as follows:

DIRECT EXAMINATION

[45]

Q. Would you state your full name and spell your last name for the record, sir?

A. Ronald Lowe, L-O-W-E.

Q. And are you presently employed?

A. Yes, sir, I am.

Q. Are you, or where are you employed at the present time, please?

A. City of Jackson Police Department.

Q. And what is your present capacity there?

A. I am a Lieutenant. I am in command of investigative operations.

Q. And how long have you been employed by the city of Jackson overall as an officer?

A. 22 and ½ years.

Q. And how long have you been in charge then of the operational capacity that you mentioned?

A. About 1 year.

Q. Okay, if you will think back to the date of March 26th, 1979, were you the Lieutenant in charge of the operation as you mentioned at that time?

A. Yes, sir, I was.

Q. And as such were you also involved in the investigation concerning the triple homicide that took place on New Years Eve at the train depo in the City of Jackson?

A. Yes, sir, I was.

Q. Is there anybody in Court at this time that you had an opportunity to come in contact then in the investigation of [46] that triple homicide on the date in question being March 26th, 1979?

A. Yes, sir, there is.

Q. Who would that be?

A. Rudy Bladel. He is sitting on his counsel's left, dressed in blue coveralls, gray hair and glasses.

Q. All right, where did you come in contact with him on March 26th, 1979?

A. At the Jackson County Sheriff Department.

Q. And specifically where at the Sheriff department did you have the first contact with Mr. Bladel?

A. In the Sheriff's office.

Q. And were you alone with Mr. Bladel or someone else present?

A. No, sir, I was with Seargant Richard Wheeler.

Q. Okay, what do you recall happening then as far as advisement of rights of Mr. Bladel and any statements Mr. Bladel that was made?

A. Seargant Wheeler advised Mr. Bladel of his rights per our form A.

Q. That would be People's exhibit no. 3? It's marked on the back, is that correct?

A. That's correct.

Q. You were present during the advisement of those rights, is that correct?

A. Yes, sir.

[47]

Q. Were you there when Seargant Wheeler affixed his signature?

A. Yes.

Q. Then were you present when Mr. Bladel affixed his signature?

A. Yes.

Q. Your signature is under 'witness', is that correct?

A. Yes, sir.

Q. And do you recall affixing that also?

A. Yes, sir.

Q. Do you recall at the end of the advisement of rights by Seargant Wheeler any statements that Mr. Bladel may have made concerning his appointment of an attorney and whether he wished an attorney present at that time or whether he would make statements without an attorney being present?

A. Mr. Bladel at that time stated that he had requested an attorney at his arraignment, but he hadn't seen him, seen the attorney yet, but he would talk to us, and he said he would talk to us, and he said he didn't need his attorney there while he was talking to us.

Q. He specifically told you as you recall that he did not need his attorney there?

A. That's correct, sir.

Q. And would speak with you?

A. Yes, sir, that's correct.

Q. And then he affixed his signature to that form?

A. That's true.

[48]

Q. Would you then state to the Court what it is that you recall concerning the conversation between yourself, Seargant Wheeler and Mr. Bladel at that time?

A. We started out talking to Mr. Bladel in regard to his schooling, his employment on the railroad, if his parents were living, just small talk leading up to the questioning.

Q. This would be background concerning Mr. Bladel's life, is that correct?

A. Yes, sir.

Q. And after the conversation concerning his background and his education did you ask him anything concerning the homicide at the train station on New Years Eve?

A. Yes, sir, we did.

Q. Would you relate to the Court the conversation as you recall it concerning that matter between yourself and Mr. Bladel?

A. We started out by explaining to Mr. Bladel all of the evidence we gathered, the weapon, the particles that

was found in the suitcase, the particles that was found in breech of the shotgun, the shell casings that was found down at the depo and the fact that the shotgun had been found and was up to the Michigan State Police Crime Lab in Lansing right now being checked for bullistics (sic).

Q. Did you also have with you the copy of the ATF form concerning the sale of the same shotgun with the same serial number which had been found and turned into the city police?

[49]

A. Yes, sir, we did.

Q. And was that signed by Mr. Bladel?

A. Yes, it was.

Q. And did you show that to him?

A. Yes, we did.

Q. And did he examine it in your presence?

A. Yes, he did look at it.

Q. Go ahead and tell us what if any further conversation took place, then after these facts were made known to Mr. Bladel?

A. In regard to the weapon he stated that he had bought the gun, but said he had thrown it away after he got out of prison because he didn't want to go back for a weapon charge. We asked him if he had done anything to the weapon because knowing there was a block of wood placed in the magazine of the gun, and he says yes, he says, I was working on the gun one day and he says the spring or the spring that holds this into the magazine had blown out and couldn't find it, so he put a block of wood in the end of the magazine to hold the spring in.

Q. What was that, or why was that significant to you?

A. Because I felt only the person that had that weapon would have known that that block of wood was in the gun.

Q. And in fact there had been a block of wood in that position when it was turned in as evidence?

A. That correct.

[50]

Q. Proceed then and tell us what you recall?

A. After that statement, Mr. Bladel leaned back in his chair and says, "Well, you got me, what do you want to know?"

Q. And would you relate to the Court any further conversation between yourself and Mr. Bladel?

A. We asked Mr. Bladel if he would start right from the night of the shootings on January 31, 1978 and he stated he left the hotel about 6:15 P.M., carrying his suitcase with the weapon in it and he walked down to the depo by the hot air room, set his suitcase down and put his weapon together, walked in the door, shot the man sitting in the chair by the side door and shot the man sitting at the picnic table and put one more slug in each of them, and he says, as he was on his way out another man walked through the door, and he said he shot him, knocked him down and the man fell out onto the platform and he said he walked out and put another slug in the man's head, put his gun back in the suitcase and walked in the southerly direction across the railroad tracks back to his hotel.

Q. Was this gun broken down into two pieces?

A. Yes.

Q. Did he mention whether or not he had broken it down?

A. I recall specifically him saying that when he got down to the depo he put his gun together after taking it out of the suitcase.

[51]

Q. Was there any further conversation then between yourself and Mr. Bladel as to what if anything he may have done after that or why he did what he told you he had done?

A. Mr. Bladel stated that he went back to his hotel room and sometime later on that evening he heard his name mentioned over the radio, or not his name, he heard that there had been a shooting and they were looking for an ex-railroad employee from Elkhardt, Indiana, in regard to the shooting and he stated he became concerned about that and he wrapped his gun up into a parka or a coat and walked out toward the Cades, he didn't specifically mention the Cades, but out to a park and where he left the gun.

Q. Okay, and was there any further conversation then?

A. We asked Mr. Bladel if he would write his statement out for us on our form C and he stated he would.

Q. Okay, did you make any threats to Mr. Bladel at any time, either before the oral conversation or prior to the written statement that he made?

A. No, sir, we did not.

Q. Did you deny him the use of any facility at all?

A. No, sir, we did not.

Q. Did he make any request of you for anything, a drink of water, or coffee or use the washroom or anything of that nature?

A. He did not.

Q. Okay, so there was nothing to deny him, then, I take it?

[52]

A. No, sir.

Q. Did you strike him at all?

A. No, sir.

Q. Did Seargant Wheeler strike him in your presence?

A. No, sir, he did not.

(WHEREUPON, THE COURT REPORTER MARKED PEOPLE'S PROPOSED EXHIBIT NO. 4.)

Q. Lieutenant Lowe I show you what has been marked as People's proposed exhibit no. 4 and dated with today's date, July 5 with the red stamped and inked impression on the back. Would you look at People's proposed exhibit no. 4 and then I would ask you some questions concerning exhibit no. 4.

A. Yes, sir.

Q. Do you recognize that or can you recognize that as being something that you came into contact with on, or at the Sheriff's Department on March 26th, during your interview with Mr. Bladel?

A. Yes, sir, I can.

Q. How can you recognize it and identify it as being one and the same item?

A. By my signature.

Q. You recognize that as being your handwriting?

A. Yes, sir.

Q. And you affixed it there to?

[53]

A. Yes, sir.

Q. And did you do anything concerning people's proposed exhibit no. 4 prior to Mr. Bladel's affixing his handwriting there to?

A. Yes, sir.

Q. And state to the Court what procedure you followed and what, if anything, you advised him of?

A. I advised Mr. Bladel that this was a statement of his rights concerning his rights to make a statement or not make a statement and I read this form C to him.

Q. Would you read that into the Record as you did on the date in question to Mr. Bladel?

A. Yes, sir. First of all I put the incident no. at the top, 78-035861 and also the date, 3-26-79, and the time started would be 1:45 P.M. And under statement of rights — excuse me, under statement of I put in Rudy Bladel. I printed that out and I read to him his rights. I fully understand that I have the right to remain silent and need not to talk to anyone and that any statement or answer to any questions can and will be used against me in a court of law. I fully understand that I have a right to

consult with a lawyer and to have him present prior to or while answering questions and giving a statement and I fully understand if I can't afford an attorney the Court will appoint one for me if I wish. And, then I may talk with him before I answer any questions or give my statement. I understand that if I [54] desire and so indicate the questions and answers to them by me while or will cease at any time during the course of this statement. I know these are my rights, but I desire to waive them and I do not desire an attorney at this time and I voluntarily give the following statement without any threats or promises being made to me or against me or any others.

Q. Okay. Now, after you advised him of that was there any conversation with Mr. Bladel concerning whether he understood what you were telling him?

A. I asked Mr. Bladel if he understood his rights and he stated he did.

Q. Was there any mention of an attorney at that time?

A. I asked him if he desired his attorney present and he stated he did not need one.

Q. What, if anything, further took place then?

A. In addition to the last statement that Mr. Bladel said, when I asked him if he needed his attorney present he stated, "I don't need him present. I am going to plead guilty anyway."

Q. He never did request an attorney or to see his attorney that he may have requested at the District Court arraignment?

A. No, sir, he did not.

Q. All right, then did he write and make certain affixations to that sheet?

A. Yes, sir, he did. He wrote out his statement and signed it.

[55]

Q. And that was done in your presence?

A. Yes, sir, it was.

Q. You sat there during the time he subscribed these words to the page?

A. Yes, sir, I did.

Q. And he also signed in your presence?

A. Yes, sir.

Q. Would you read to us what it was that he wrote down?

A. His statement is as follows: "On December 31, 1978, I walked into the hot room at Jackson depo and shot 3 men to death. I then went back to the hotel and then threw the gun away. The reason is that the railroad and the union and the Michigan trainmen took my job and hired other men to work at Elkhardt." It's signed Rudy Bladel, and I affixed the time as the time ended at 1:52 P.M., 3-26-79.

MR. GRANT: I show people's proposed exhibit no. 4 to defense counsel, Your Honor, and we would ask that it be admitted as people's exhibit no. 4.

MR. WILLIAMS: No objection.

THE COURT: There being no objection, people's exhibit no. 4 is admitted.

Q. (BY EDWARD GRANT) Was there any further conversation or any further interaction with Mr. Bladel at that time?

A. We thanked Mr. Bladel for his statement and he was returned to his cell by the Sheriff department personnel.

[56]

Q. At the time you are conversing with him and at the interview on the date in question, how did Mr. Bladel physically appear before you on that date?

A. He was alert, he was quiet, looked to be in good health and spirits.

Q. All right, and would he answer the questions that were directed to you in a sense. I believe manner that is — would the answer be responsive to the questions?

A. Yes, sir, we would ask him the question and he would sit back and think before he answered the question. However, at the end of the — towards the end of the interview prior to him saying that he had done this, these killings down at the depo, we noticed him getting quite nervous, his muscle in his throat was thumping quite badly, and he was always continually picking at his finger nails at that time.

Q. Did he appear to you in your experience as a police officer to be under the influence of alcohol or drugs at the time of the statement?

A. No, sir, he did not.

Q. Okay — and had you gotten him from somewhere prior to him, his being brought to the sheriff's department —

A. I'm sorry.

Q. Did you go back — did somebody else bring him out?

A. Somebody brought him out.

Q. He had been in the jail prior to your talking with him, is that correct?

[57]

A. Yes, sir.

Q. Did he indicate to you that he was extremely tired or did he appear to be physically tired to you?

A. No, sir, he did not.

MR. GRANT: I have nothing further.

THE COURT: Could I see exhibit no. 4 please? Cross examination, Mr. Williams?

CROSS EXAMINATION

BY MR. WILLIAMS

Q. All right, were you present when these rights were read to the defendant, Mr. Bladel?

A. On the 26th of March, sir.

Q. Yes.

A. Yes, sir.

Q. Did you hear Mr. Bladel state that he had requested an attorney?

A. He had requested, yes, I heard him say that he had requested an attorney at his arraignment, sir.

Q. Did you ask him whether or not he had seen an attorney?

A. I think Mr. Bladel, his statement was that he had requested one at his arraignment, but he hadn't seen him yet.

Q. Isn't it true that Mr. Bladel seemed kind of concerned that he had requested one on the 23rd and here it was the 26th and he didn't have his attorney?

A. You are asking me how he felt. I don't know how he felt, sir.

[58]

Q. Did he express that he was concerned about this?

A. Well, he said that he had requested one at his arraignment but he hadn't seen him yet. That was his statement.

Q. Did you cease questioning after he stated that he had requested an attorney?

A. He didn't request an attorney be present during this interview, sir, his request was that he had said that he had requested an attorney at his arraignment.

Q. And after learning that he had requested an attorney at the arraignment did you stop questioning at that point?

A. No, sir, he was advised that if he wished to have an attorney present during this questioning that then he could at any time he wished have his attorney present.

Q. Did you cease to question, did you cease the interview after you were informed that he had requested an attorney?

A. No, we did not.

Q. How long did you question Mr. Bladel?

A. The entire time that we was there was from 12:42 when he was first advised of his rights and I believe the questioning concluded at 1:52 P.M. in the afternoon on 3-26-79, so it would be an hour and twenty minutes.

MR. WILLIAMS: I have nothing further.

REDIRECT EXAMINATION

BY EDWARD GRANT

Q. At no time while you were present with Sargant Wheeler —

[59]

MR. WILLIAMS: Your Honor, we are going to ask that the prosecutor stop leading this witness. It's been going on and on and on and now he is just giving testimony.

MR. GRANT: Let me rephrase it then.

Q. (BY EDWARD GRANT) Did Mr. Wheeler at any time request to consult with his attorney or to contact an attorney or have an attorney, or the Court appoint an attorney, and have him present while you were talking with him on the date in question?

A. No, sir, he did not.

MR. GRANT: Nothing further.

THE COURT: You may step down.

MR. GRANT: May I look at the Court file for a moment, Judge?

We have no further witnesses for the Walker Hearing at this time, Your Honor.

THE COURT: Mr. Williams, do you have any testimony you wish to present or other evidence?

MR. WILLIAMS: Yes, Your Honor, we would call the defendant to the stand.

RUDY BLADEL

Being first duly sworn in by the Clerk at 10:55 P.M. was examined and testified under oath as follows:

DIRECT EXAMINATION

BY DOUGLAS WILLIAMS

Q. Now, state your name and spell your last name, please?

[60]

A. Rudy Bladel, B-L-A-D-E-L.

Q. Where do you live?

A. Elkhardt, Indiana.

Q. Now, you have heard the testimony of the 3 police officers, and calling your attention to January 1st, 1979, were you arrested at that time?

A. Yes, sir, I guess they took me to jail.

Q. And did they tell you why you were being taken to jail?

A. Originally, no, they gave me no indication. I was just taken to jail.

Q. You were placed under arrest?

A. I was placed — they said nothing to me. They just said put your hands to the police car and they didn't say anything to me. I didn't know why I was arrested until I got there.

Q. And, did you have, after you got there what happened?

A. They questioned me on these murders.

Q. Who questioned you?

A. Sargeant Rand.

Q. Were you given your rights at that time? Did they read these rights to you?

A. Yes, they did.

Q. Did they tell you that you had a right to an attorney?

A. Yes, they did.

Q. Did you request an attorney?

[61]

A. Not at that time, no. I had no money for an attorney.

Q. You had no money?

A. I had no money, no, I didn't think I had any reason to need an attorney at that time.

Q. Did you sign a form waiving your rights?

A. No, I did not.

Q. And, why didn't you sign the form?

A. Because I didn't want to make my statement.

Q. And did you indicate that you didn't want to make a statement?

A. I said that I just didn't want to answer their questions. They keep pushing that.

Q. I don't understand?

A. They keep pushing to get questions out of me, but I don't necessarily want to answer their questions.

Q. They kept pushing you?

A. Yeah.

Q. But, you hadn't signed your waiver of rights?

A. No, I didn't sign.

Q. But, they continued to talk to you anyhow?

A. Well —

Q. And this was on January 1st, now, on January 2nd, were you again questioned?

A. Yes.

Q. And did you sign a waiver of your rights at that time?

A. No.

[62]

Q. And why didn't you sign the waiver of your rights?

A. Because I didn't want to — I just didn't want to say anything.

Q. Did you indicate that you didn't want to say anything?

A. Yes.

Q. And they kept talking to you anyhow for one hour, is that correct?

A. Yes, sir, just kept a little bit of pressure up.

Q. And there was pressure on you?

A. Physchological, they didn't use any physical force.

Q. How did you feel?

A. Well, you don't feel very good. You just don't — you try and hold back as much as you can. I mean there is just a limit to how much you can not say. They had the upper hand all the way on it, I realize that.

Q. How do you feel that they have the upper hand?

A. Well, I am not exactly there on my own free will and volition. I can't leave whenever I feel like it.

Q. You mean you can't leave the interrogating room, when you feel like it?

A. Right, I have got to stay there.

Q. You have got to stay there, and how you felt, that you were under pressure, is that correct?

A. Right, absolutely.

Q. Now, calling your attention to March the 22nd, when you were [63] arrested in Elkhardt, is that correct?

A. Yes.

Q. And as I understand it, you waived extradition?

A. They — when I got in the police car the first thing he started, whoever was the policemen, there in the front seat he started telling me that I had to waive extradition and if I didn't waive extradition, they were going to get me anyway and they were going to just slow the thing down and I would have to stay in jail in Elkhardt a little bit longer and it would be in my best interest to waive extradition and I had to ask them to wait a minute. I have got to think about this for a few seconds, but he kept on pushing that I was to waive extradition immediately and

if not sooner and he kept on and I said, well, okay to heck with it. I will waive extradition. I didn't know what to do, and I didn't have a lawyer.

Q. Did they tell you you could have a lawyer?

A. If they told me I don't remember them telling me.

Q. And in the car when you first were arrested, do you recall them saying you have a right to an attorney or did they say you have got to sign the extradition papers?

A. They were — they said I had to sign the extradition papers and it was like right now, and everything was push, push, push, but I don't remember them saying anything about a lawyer.

Q. Now, do you recall talking to detective Rand after you got [64] back to Jackson on the 22nd?

A. Yes, that was late at night.

Q. That was late at night, what time was it?

A. Oh, it was ten or 11 o'clock at night. I don't know, I had no watch.

Q. What time were you arrested in Elkhardt?

A. Four or five o'clock, somewhere in there.

Q. And you were extradited and then returned to Jackson, is that correct?

A. Right.

Q. And then after you got to Jackson were you booked?

A. I don't know if I was booked the 22nd or the 23rd.

Q. Okay, when you got back now did they put you in a cell?

A. Yes, in the Jackson Police Department, there is only one cell there.

Q. I see, and after being in the cell what time can you estimate that you were locked up?

A. Well, I was locked up all night.

Q. But, I mean prior to Detective Rand talking to you?

A. I wasn't in the cell at all for that. They took me right to the interrogation room.

Q. As soon as you got into Jackson?

A. That was right in —

Q. That was around ten or eleven o'clock at night?

A. Somewhere in there yes, I don't know what time it was [65] because it was — I had no watch.

Q. Well, Detective Rand, was he alone when he talked to you?

A. No, there was somebody from Elkhardt. I know him but I don't know what his name is.

Q. How long did they question you at that time?

A. I would say about an hour, again, I don't know.

Q. Now, the next day you were arraigned in front of Judge Crary, is that correct?

A. I don't know which Judge it was, but I was arraigned.

Q. And at such time did you request an attorney?

A. Yes, I did.

Q. And did you explain what was your means for retaining an attorney?

A. Yes, they gave me a form that I filled out and I filled that out the best I could.

Q. and (sic) what did this form consist of?

A. I had a bunch of questions on how much money I had and different things like that.

Q. And this was, am I correct was this to ascertain your being appointed an attorney?

A. Yes, I asked for a court appointed attorney.

Q. Were you told that you had an attorney, that they would grant your request?

A. No, they gave me no indication that I would get one. That was the problem, I was hoping that they would say something.

[66]

Q. And that was the 23rd, is that correct?

A. That's correct.

Q. And on the 24th did you see an attorney?

A. No.

Q. Did anyone else tell you an attorney had been appointed?

A. No, I asked the guard there if I had been granted an attorney and he didn't know.

Q. And on the 25th did an attorney talk to you?

A. No, no attorney on the 25th either.

Q. And did you ask whether you had been granted an appointment of an attorney?

A. I asked on the 26th, but not on the 25th.

Q. And when was that you asked on the 26th?

A. Well, this was in the morning and I can't tell you what time. It would have been after 8:00 because I asked the day man, and he went to work at 8:00.

Q. What did you get for an answer?

A. He didn't know.

Q. So, from the 23rd to the 26th no one had contacted you to tell you whether or not you had an attorney?

A. No, they gave me no indication one way or the other.

Q. And at the questioning by Lieutenant Lowe and Seargant Wheeler did you inform them that you had asked for an attorney?

A. I sure did.

Q. What else did you ask about the attorney?

[67]

A. Well, I wanted to know if I was going to get one.

Q. And what did they tell you?

A. Well, they didn't know. They just — I was hoping for an attorney to tell me what to heck to do here.

Q. And when they gave you your rights you informed them that you wanted an attorney, is that correct?

A. Well, see before they arrested me there was no charge. I simply didn't need an attorney because I hadn't

been arrested, and there was no actual charge against me. But, once I was arrested this was another ball game.

Q. On the 22nd?

A. On the 22nd, then I needed an attorney because now I was actually being charged with something.

Q. So, you informed him that you wanted an attorney?

A. I sure did. I had that in writing.

Q. Pardon?

A. I had that in writing on that form.

Q. And how did you feel on the 26th, that you hadn't received an attorney yet?

A. I didn't feel too good. I was a little apprehensive. I was wondering if they were actually going to get an attorney. I might not get one at all, so I didn't know what was happening.

Q. And when did you first get your attorney?

A. The next day.

[68]

Q. That would be the 27th?

A. The 27th.

Q. And Mr. Bladel on the 26th when you were being asked when you were there, were you cool and calm at that time?

A. I don't know how you can be cool and calm in a jail cell after I mean it's really getting you all worked up, you don't know what's happening, you just — the physcho-

logical pressure are tremendous. The fact that you don't show them doesn't mean they're not there.

Q. Well, didn't your attorney advise you?

A. I didn't have any attorney. I was hoping I could get some advice from an attorney. I needed it real bad. You get it from the police department, you don't get the advice I want, you get the advice they want to give you.

MR. WILLIAMS: I have nothing further.

THE COURT: Mr. Grant?

CROSS EXAMINATION

BY EDWARD GRANT

Q. How far did you go in school, Mr. Bladel?

A. I graduated from high school.

Q. You were able to read and write, aren't you?

A. Yes.

Q. Fairly well?

A. Right.

Q. Okay, and when Detective Rand advised you of your rights on [69] January 1st, he did give you a blank sheet, identical to People's exhibit no. 1 other than the writing that's affixed there along and you followed along did you not?

A. Yes.

Q. And you knew what he was telling you?

A. Yes.

Q. Okay, and he did tell you if you can't afford an attorney, lawyer, one will be appointed for you, is that correct?

A. Right, well one wasn't appointed.

Q. Did he advise you of that?

A. On the 1st.

Q. On the first?

A. Yes.

Q. And you understood that?

A. Yes.

Q. And yet you did not sign the acknowledgement and waiver on January 1st?

A. Right.

Q. Why not?

A. Because I didn't want to say anything.

Q. Did you tell Detective Rand that you did not wish to speak to him about this or didn't want to say anything?

A. I talked with him.

Q. My question was, did you tell him that you did not wish to talk with him or answer any questions but you wanted to stay silent or words to that affect?

A. No, I talked to him.

[70]

Q. You went ahead and talked to him, you didn't wait, or indicate at any time that you didn't want to speak to him until finally you decided you didn't want to say anymore, isn't that about the way it went?

A. Well, I don't remember actually refusing to say anything but maybe I just stopped talking and that was it.

Q. That's what happened, you just stopped talking?

A. Uh huh.

Q. You never even at that time said I am not going to answer any more questions, you remained silent?

A. I remained silent.

Q. You kind of sit there and stared dead ahead right?

A. Right.

Q. Were you nervous at that time?

A. I wasn't exactly nervous — or calm and collected being in jail and all, and it doesn't make any difference where you are at or why you are there or how you are there, you are there.

Q. When you are not calm and collected do you do anything or are there any signs that a person might observe about you physically to know that you are not calm and collected or do we just take your word for it?

A. I don't know, figit with my fingers or something.

Q. There is no question in your mind that on January 1st you were advised of all of these rights you had a form and followed along and you never told Detective Rand at that time anything about wanting, or you didn't wish to speak with him you went [71] ahead and answered any questions he asked you, true?

A. More or less, yes.

Q. All right, on January 1, 1979, it was not the first time you came into contact with the Police Department and the advisement of rights is it not?

A. No.

Q. You have been talked to by police on numerous occasions prior to January 1?

A. Right.

Q. In Elkhart, in Jackson, maybe not Jackson but Elkhart?

A. Yes.

Q. By the Police Department in Indiana?

A. Right.

Q. And you had been advised of your rights in numerous occasions prior to December 31, 1979, in Jackson?

A. Yes.

Q. So, you knew what your rights were didn't you from past experiences?

A. More or less, yes.

Q. There were no big revelations or secrets that were now being unlocked for you on January 31 by Detective Rand, true?

A. This is on January the first?

Q. Yeah.

A. No, nothing tremendous.

Q. You knew you had a right to remain silent from what had been [72] told before?

A. Yes.

Q. Because on other occasions you had remained silent hadn't you in Elkhart?

A. Yes, but the pressures were not put on me, psychological pressures that there is a limit to how long you can remain silent under certain circumstances.

Q. But, the answer to my question is yes, you had remained silent on other occasions?

A. Yes, I have.

Q. And you also have been advised of your right by federal authorities from the firearms, back on or from the U.S. Treasury Department, haven't you?

A. Yes.

Q. And you have been arrested and been in Court on at least two separate occasions where you were convicted?

A. Yes.

Q. Did you have attorneys?

A. Yes.

Q. So, you knew you had a right to attorneys because they were both appointed attorneys in the past?

A. No, one was appointed and the other was not.

Q. All right, the state charge you had retained your own attorney but for the federal charge you had a federal appointed defense counsel, did you not?

[73]

A. On the federal charge there was . . . they did not question me at all after I got an attorney.

Q. You did have a Court appointed attorney on that occasion?

A. Yes.

Q. So, you were aware of the fact that in fact if you are indigent or unable to afford a lawyer, just like Detective Rand told you, you would get a Court appointed attor-

ney and that was one of your rights, and you knew that on January 1 from your prior experience?

A. It was also —

Q. Did you or didn't you?

A. Yes, I did.

Q. Okay. Now, on the second of January when Detective Rand spoke to you again he advised you of these same rights, he didn't give you a piece of paper, but he told you the same things that he read to you the day before from the form?

A. Yes, he did.

Q. Which included you could remain silent and could have a Court appointed attorney if you wanted one and you can get your own attorney and you were advised about that weren't you?

A. But, I also knew from —

Q. Is your answer yes?

A. Yes, sir.

Q. And you talked to him on that occasion too for over an hour, didn't you?

[74]

A. Yes.

Q. And I was present also wasn't I?

A. Yes, you were.

Q. And you answered all of the questions that you were asked, did you not?

A. More or less, yes.

Q. Did you at any time say, you did not wish to answer any questions or I don't want to answer any question?

A. I don't believe — I don't remember exactly my wording on all of the questions, but . . .

Q. You would sit there and think about it sometimes for several moments, you would sit there silently and then you would give an answer, whatever you saw fit as being the proper answer at that time?

A. Yes.

Q. Did you at any time indicate either to myself that you felt that psychological pressures were beating you down and that maybe we should help you in some way or make any statement at all to indicate that you felt that you were being psychologically pressured?

A. You were yelling at me. You wanted the shotgun, you said where is the shotgun, where is the shotgun, somewhere is the shotgun and I didn't have the shotgun. You went through all my stuff and I had no shotgun.

Q. That's not responsive to my question. I am asking you to, did [75] you make any comments to myself or Detective Rand that you felt you were being put under undue duress upon you or psychological pressure, so that you were unable to answer any questions?

A. I didn't make any comments, no.

Q. As a matter of fact, you were pretty calm, cool, and collected?

A. You were still using the psychological pressure on me. The fact that I am not saying anything doesn't make any difference there.

Q. Well, the fact of the matter is weren't you at that time kind of playing games with us because you wanted to know whether we had the shotgun and what evidence we had against you and you weren't . . . weren't you asking us about as many questions as we were asking you?

A. I am trying to find out what evidence you have against me, yes.

Q. You wanted to know whether we had the shotgun didn't you, you wanted to know what kind of evidence we had against you didn't you, so maybe the hour you spent half an hour asking us questions about evidence we had against you?

A. No, I didn't ask any questions.

Q. You didn't ask about the shotgun, where was the weapon that was used?

A. No, I told you I did not have it.

Q. I'm asking you did you not request of us if we had the murder [76] weapon and where it was, didn't you request that of us?

A. No, I did not.

Q. You just sat there and answered our questions and in that interview, that interview terminated when you said you had to use the washroom?

A. Approximately, yes, sir.

Q. And you had no time to answer any questions or an attorney when you wanted to use the washroom and that terminated the interview, right?

A. Right.

Q. Did you at all ask for anything, did you not receive food, drink, use of the washroom?

A. I didn't ask for much of anything, but it was not denied.

Q. You weren't physically abused in any way?

A. No.

Q. Was there no physical abuse, there was no hot light on you?

A. No.

Q. No hot light on you? Nobody hit you with any rubber hose?

A. No.

Q. On March 22 of 1979 you were arrested in Elkhart and extradited and brought back to Jackson?

A. Right.

Q. And you were brought before the Judge in Elkhart weren't you at Municipal Court?

A. Yes.

[77]

Q. And the Judge explained to you what your rights would be as far as an extradition hearing didn't he?

A. Yes, I believe he did.

Q. You stood right up in front of the bench didn't you and he spoke to you and told you what your rights were and you told him you wished to waive extradition and you signed all of the extradition forms did you not?

A. Yes, I did.

Q. You didn't ask for an attorney at that time even though he advised you you would have a right to have an attorney and an extradition hearing if you desire?

A. I decided it would be best if we went to Jackson and argue with them in Jackson and not necessarily in Elkhart.

Q. But you understand you had a right to have an attorney and could have had an attorney and you waived those rights?

A. Right.

Q. Because that was because this detective talked to you or you decided it would be better to go back to Jackson?

A. The detective decided that.

Q. I am asking you why you made your decision, is that based upon your consideration as you just stated or was it because this detective was putting pressure on you as you mentioned in direct examination?

A. It was a little bit of both. We will go fifty-fifty on both of them.

[78]

Q. You felt that you were coerced in some way to waive extradition?

A. Well, he put a great deal of pressure on me the second we got in the car.

Q. Did you ever mention that to the Judge before you were before the Judge?

A. No, I didn't.

Q. Why not? Here is an impartial magistrate, why didn't you tell the Judge I feel I am being duressed into this? I want the hearing Judge?

A. I didn't see where the hearing in Elkhart would do any good as far as what happened in Jackson.

Q. You fully understood what was going to happen when you were brought before that magistrate did you not?

A. Oh, I don't know if I fully understood because I'm not a lawyer.

Q. Did you ask the Judge any questions because didn't he give you an opportunity, do you have any questions concerning this Mr. Bladel and you didn't have any questions did you?

A. Well, I simply have no idea what the law is or in any way shape or form.

Q. Why didn't you ask the questions of the magistrate when you had that opportunity?

A. Because I didn't think the pressure were, the shock of being arrested and the pressures were extremely great at that time and it's very easy to come back three or four months later [79] and ask that question, but I didn't.

Q. So, you were saying you were in shock at the time and greatly excited?

A. There was quite a little shock one minute you are out on the street and the next minute you are in the lockup.

Q. What are you saying then, you didn't fully comprehend what was going on?

A. The pressures were ultra extreme on me, they were not on you. You were the one that was applying the pressure.

Q. Well, let us not decide who the pressures were on, and why was it then if you felt you had all of these pressures and standing outside and wouldn't get back in the patrol car until the TV crew didn't you insist on standing out there waving to the camera before you got back into the patrol car after you signed the extradition?

A. I waved to the TV camera?

Q. Don't you remember?

A. With my hands cuffed behind me?

Q. You insisted on standing there?

A. I didn't insist on nothing.

Q. You don't recall that?

THE COURT: Aren't we getting a little bit outside the scope?

MR. GRANT: Not if he is saying at this time because of the duress and psychological pressure . . . [80] well, I will move on.

THE WITNESS: When I went to the patrol car all I did was raise my hand a little bit.

Q. (BY EDWARD GRANT) I see.

A. You are getting into something completely different.

Q. What was that the wave or gratuity?

A. I held my hand up, they had the bright lights on and I shielded my hands up, that's all I did.

Q. You were advised of your rights at the City of Jackson, Detective Bureau, by Detective Rand on March 22, 1979 were you not?

A. Yes.

Q. And you understood them didn't you?

A. Think so.

Q. Did you understand them, just answer the question will you please, did you understand the rights as you were told?

A. I was hoping to get a lawyer.

Q. Could we ask that his answer be responsive, Your Honor?

THE COURT: Would you please answer the question Mr. Bladel. The question is did you understand your rights?

THE WITNESS: I believe I understood my rights, Yes.

(BY EDWARD GRANT) And you signed on People's Exhibit No. 2 [81] the acknowledgment and waiver, did you not?

A. This was the day I was arrested?

Q. This is the 22nd, right when you were brought back to Jackson.

A. Yes, this was late at night.

Q. This is your signature?

A. I signed it, yes.

Q. Okay, and you did that freely and voluntarily?

A. Yes.

Q. And you didn't ask for an attorney did you?

A. Not at that moment, no.

Q. And you went ahead and talked with Detective Rand and answered his questions?

A. Yes.

Q. For approximately an hour?

A. Yes.

Q. Never asking for an attorney?

A. I didn't know at that time. What was going to happen.

Q. Did you ever ask for an attorney?

A. I did not ask for an attorney.

Q. And at that time you knew you were under arrest for murder because you had been extradited already for that murder charge from Indiana?

A. Yes, I had been extradited but there had been no Court hearing or anything. I don't know what the score was at all.

Q. There is no question in your mind that you were under arrest, [82] however at that time?

A. I was very definitely under arrest.

Q. And then nobody talked to you until the 26, isn't that correct, you were taken over to the county jail?

A. Well, I was . . . they talked to me the 23rd in Court.

Q. All right, I am talking about a detective coming and interviewing you?

A. The detectives did not talk to me on the 26.

Q. And then on the 26 of March you were taken to the Sheriff's Department from this cell block, right?

A. Right.

Q. And Lieutenant Lowe and Sergeant Wheeler were there, right?

A. Yes.

Q. Were you advised of your rights at that time?

A. Yes, I was.

Q. And did you not sign People's Exhibit No. 3 under the acknowledgment and waiver that you understood your rights and that you would go ahead and speak and you didn't wish an attorney to be present?

A. Well, I didn't necessarily say I wished to speak. They just started asking questions.

Q. Did you sign this?

A. I signed it.

Q. Was it read to you?

A. Yes.

[83]

Q. Did you get a chance to read it?

A. Yes, I did.

Q. Does this sound familiar, I wish to answer questions or to make a statement without first consulting with a lawyer or to have a lawyer present during questioning, isn't that just what it says there where you signed?

A. I wished I had a lawyer, I mean I didn't know what to say or do without, that's the whole problem with when you are not under arrest. It's one problem and when you are under arrest it's a completely different situation.

Q. Well, explain this to the Court then, how come on January 1 you would not sign the acknowledgment of waiver, didn't you say because you didn't wish to say anything at that time even though you never made that known to Detective Rand yet on the 26 of March, you go ahead and sign the acknowledgment of waiver, didn't that indicate you did wish to speak if that's what you said is true concerning January 1?

A. Well again, the pressures are very different when you are under arrest then you don't think anywhere near the way at one time and you do under another situation.

Q. You heard Lientenant Lowe and Sergeant Wheeler testify did you not?

A. I did.

Q. Okay, did you in fact after you were advised of your rights tell them you asked for a Court appointed attorney as they [84] said?

A. Yes.

Q. And did they not then tell you as they testified, as that they asked you, do you wish an attorney present, either that attorney or any other present?

A. Yes, I needed an attorney.

Q. And did you not say no I will go ahead?

A. Well, I had to go ahead because —

Q. Did you say that, I will proceed without an attorney or words to that effect?

A. Well, I said I had to go without an attorney. I hadn't got an attorney.

Q. Did you say you would proceed without an attorney after they told you you could have an attorney?

A. I didn't have an attorney. I was in no position to force anybody to appoint an attorney.

Q. You could have remained silent, did you tell them at anytime I don't wish to talk to you, I don't have an attorney and I asked for one and I am not going to say anything?

A. That's what I should have done, but I didn't do that.

Q. You went ahead and talked with them?

A. I didn't have an attorney to advise me what to do.

Q. But you knew at that point you could have stopped and asked for your attorney to be present or some attorney to be present, knowing that you could get one even though you didn't have any [85] money and the Court will appoint one for you if they hadn't done so?

A. The Court said they would appoint one.

Q. Didn't you know at the time you had a right to have an attorney and could have remained silent hadn't you been instructed by Sergeant Wheeler of that fact just like you had been on numerous other occasions in the past by various police officers?

A. The situation is again completely different when you are under arrest and the Court said that they would

write on that paper and they would get me an attorney and an attorney would be appointed and an attorney was not appointed.

Q. Why didn't you ask Lientenant Lowe where your attorney was? Here is your chance to talk with somebody that has official capacity to find out where the attorney was and you never said a word did you?

A. I asked him where the attorney was and he said he didn't know.

Q. Did you tell him you wanted to speak with your attorney?

A. How can I demand to speak with an attorney? I didn't have one.

Q. Did you demand to speak with any attorney or ask to speak with one?

A. I requested an attorney.

Q. You signed this acknowledgment of waiver and this has the same wording, I wish to answer questions or wish to make statements first without consulting with an attorney and without having a lawyer present during questioning. You [86] were advised of that by Sergeant Wheeler weren't you?

A. Well, I signed it because I—

Q. You went ahead and talked to them?

A. I didn't know.

Q. Did you, in fact, tell them the things you testified to?

A. But the fact I needed an attorney and the fact I didn't have one, how could I demand an attorney that I don't have?

Q. Looking at People's Exhibit No. 4 then were you also read your rights, you fully understand you have a right to remain silent and you need not talk to anybody or make any statements if you do and if you do they will be used in Court against you and I further understand that if I can't afford an attorney the Court will appoint one if I wish and that I may talk with him before I answer any questions or give any statement?

A. How can I talk to an attorney, I haven't got?

Q. Were you advised of that by Lientenant Lowe?

A. No, he didn't.

Q. You don't remember him reading that to you from Form C, People's Exhibit 4?

A. He did not.

Q. Did you read any of this before you wrote on here?

A. No, I didn't.

Q. Now, Mr. Bladel, you strike me as being a careful person. You mean to tell me you were writing out on this piece of paper without reading the other words on here, is that what [87] happened?

A. I was very shook-up at the time. They had me so screwed up I didn't know what I was doing.

Q. Why was that, because they finally did confront you with some evidence you didn't know they had?

A. I don't believe they had any evidence but they had me completely shook-up I will say that.

Q. What shook you up, the fact that the gun had been located, and the form where you purchased that shotgun, serial number had also been located in Elkhart?

A. I don't know.

Q. You weren't threatened in any way?

A. Oh no, I was not threatened.

Q. Well, did you in fact write out the wording that is aff'xed to People's Exhibit 4?

A. Yes.

Q. That's your writing isn't it and that's your signature?

A. I was never there, they did not take my —

Q. Is this your writing?

A. Yes.

Q. And that's your signature?

A. Yes.

Q. And you are not taking that you intentionally lied to the police officer are you?

A. To begin with, that the men at the Jackson Police Department [88] had nothing to do with what happened at Niles and Elkhart.

Q. You knew that you didn't have to write anything out, however, before you wrote it out, whether it is true or not, you did not?

A. I did not necessarily know anything.

Q. You felt that you had to write something down?

A. Well, they — the pressure was there.

Q. What pressure was there? What pressure was it that these officers were exerting upon you specifically, lay it out for us?

A. Just the simple fact I was in jail.

Q. That's it? You were never made any promises by these officers?

A. No, no promises.

Q. You write this out, we will let you out of jail, they never said that to you?

A. No.

Q. How did you feel that the pressure would be eliminated then and in writing out this statement and giving an oral statement to Lieutenant Lowe and Sergeant Wheeler?

A. I did not know how the pressure would be relieved. They were not interested in me. They were interested in getting the confession under any circumstances because they don't have any evidence.

Q. Well, if you felt that way why did you then make a statement and giving an incriminating statement?

[89]

A. Well, I feel that way now. I didn't feel that way then.

Q. So, to sum it up then at all-times you knew what your rights were long before you got to Jackson on January 1, 1979, because of your prior contacts did you not,

you knew you could remain silent, you knew you had a right to have a Court appointed attorney if you couldn't afford one, right, you knew all of those things?

A. I had applied for a Court appointed attorney.

Q. Did you know all of those things before you got here?

A. Yes.

Q. And you were advised of all of these rights with one exception that being you say you were not read that paragraph?

A. I was not, no.

Q. Every other time you were advised of your rights?

A. They filled that page in after I filled it out.

Q. You mean they filled in the typed portion after you wrote your statement?

A. No, the part that they filled in.

Q. With their signatures?

A. Yes.

Q. All the other times you were advised of your rights even though you knew them, and they were again reiterated, and time after time advised of your rights according to the forms and orally?

A. Yes.

Q. And you knew you had a right to an attorney at all-times if [90] you wished one and if you could not afford one and if you wanted to stop talking to them at anytime you could if you wished?

A. I could stop talking but they just didn't, I didn't—

Q. I am asking you if you knew you had that right?

A. I knew I had that right, yes.

MR. GRANT: Okay, I have nothing further.

THE COURT: Any redirect?

MR. WILLIAMS: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. WILLIAMS

Q. Mr. Bladel you have stated several times that one time you were under arrest and the other time you weren't, are you referring to the January, you considered you weren't under arrest at that time?

A. I wasn't charged with anything, I wasn't there, there was no actual charges against me. I knew I was under arrest, but—

Q. You just weren't charged?

A. Right.

Q. And at that time?

A. The pressures were not as great.

Q. Weren't you concerned with having an attorney at all at that time?

[91]

A. No, there was no — I didn't see where I had to have to defend myself against anything.

Q. Now, when you were arrested did anyone come to the cell and ask you if you wanted to come out and talk to the detectives?

A. When is tnis?

Q. Whenever you were arrested and they bring you out for questioning did they come to the cell and ask you, do you want to talk to the detectives?

A. No, they just start talking and that's it, they take you out and say come on lets go. And then I have to take it from there.

Q. And they usher you wherever they want you to go and start talking, is that correct?

A. Right.

Q. They don't ask you in the cell if you want to talk to a detective do they?

A. No, no.

Q. Did you call for the detectives on the 26th of March, did you request them to come and talk to you?

A. I never requested them.

Q. But you did continually ask the guard as you said where was your attorney, is that correct?

A. Yes, sir.

Q. Did anybody explain to you the method of receiving an attorney?

A. I personally thought I was never going to get one. I just had [92] no idea if I was going to get one or what.

Q. Now, when you were read these rights as you just finished reading the rights, did you understand these rights at the time that you were reading them or had them read to you, did you understand them?

A. Well, I understood them to a certain degree. Nobody explained them to me at all, but to a reasonable degree, yes.

Q. In other words they just read it off to you, is that correct?

A. Yes.

Q. Did you understand what you were doing when you waived the rights, when you signed your name or were you told just to sign your name here?

A. Well, you just sign them.

Q. Did you understand what you were doing when you waived the rights?

A. The problem with waiving rights is you don't get it explained by somebody on your side explaining it. Like a lawyer. The Police Department is not certainly a defendant's representative.

Q. Did you at any time feel somewhat coerced while you were being given your rights and asked these questions?

A. Well there is the mere fact that you are in under investigation and you can't just get up and leave. You got to stay right there is a slight bit of coercion and pressure.

Q. After they got to your cell did you feel at any time on the way to the interrogating room that you could turn around and [93] walk back to your cell?

A. No oh no, you could never do that. You have to go in there with them.

Q. Well, once you are in there, did you understand that you had the right to get up and go back to your cell?

A. No, I didn't understand that at all. I thought, I don't know, I could ever just get up and leave.

Q. How many people did you ask and inquire as to whether your attorney was and where he was and how many people in your mind that you can recall?

A. Oh, this was done on Saturday and it was done on Monday and it was done at least twice.

Q. You were asked the guard from where your attorney was?

A. And then I asked the Police Department where my attorney was.

Q. And they just stated they didn't know?

A. Didn't know, had no idea.

Q. Did anybody ever tell you that they would check to find out if you had attorney?

A. Oh no, no they never said anything. They never mentioned any representation for me at all.

Q. Did anyone with authority tell you they would do the checking and get your attorney there?

A. No, even the Police Department made no attempt to say well, we will check for you or something. They never did anything.

Q. Did Lieutenant Lowe tell you on the 26th since you hadn't [94] seen an attorney yet that he would check it out for you?

A. That's what I mean, he didn't make any attempt to check on anything or get an attorney or whatever.

Q. Now, when the question was going on and stated that somebody was shouting to you, the Prosecutor was shouting at you, how many people were shouting at you?

A. Two of them.

Q. This was at the same time or did one shout and the other shout?

A. Well, they weren't actually shouting but they kept on with a very loud voice.

Q. I see, and so that at that time you were expected to be calm?

A. Well—

Q. But you were calm?

A. How do I look now? Am I calm? How calm can you be under any kind of pressure?

THE COURT: Were you calm then?

THE WITNESS: I would say I was as calm then as I am now.

THE COURT: All right, that answers your question. Go ahead.

MR. WILLIAMS: I have nothing further.

MR. GRANT: I have no further questions.

THE COURT: You may step down. Anything [95] further Mr. Williams?

MR. WILLIAMS: Nothing further, Your Honor.

THE COURT: Mr. Grant anything further?

MR. GRANT: I have nothing further. I am assuming the Court can take judicial notice of the Record and

the Court appointment that is in the Court file. I am assuming that probably Mr. Williams would not want that done so there is no question and I am I guess, I can stipulate that that can be done and that's all in the file with the Circuit Court in our county.

THE COURT: Any further remarks Mr. Williams?

MR. WILLIAMS: Your Honor, we just in final comment we did file a brief and without going into the brief itself we would just submit to the Court at this time that even though we have a waiver of rights here, we have a man that got us to what his background of it was and how many times he was arrested. He did not know the procedure to be taken and that the man felt that he had asked for an attorney on the 23rd and all he knows is the days went by and he didn't receive an attorney. So, we feel at that point he was denied his rights and we further submit to the Court that when the prosecution or the police authorities had a line up, where they arrest a man at 9, 10 o'clock in the daytime [96] and they need a Court appointed attorney to represent him, a phone call from the Court Administrator has one member of a firm at the jail by 1 o'clock and just a phone call can do that and the brevity of this case should have required that at such time as the attorney was appointed, the same Court Administrator could have and should have called one of the firms that handled indigent cases. The testimony has shown the Court that the man didn't see his attorney until the 27th and that is some four days after this Court appointed the firm of Adams, Goler, and Williams to represent this defendant.

[97]

Certainly, he felt that he didn't know his rights and there was no one to explain his rights to him and so that

after he was arrested he is wondering (sic) around in a world that is set up and made for attorneys to handle and we expect a common lay person to know that he has rights here and he has rights there and he is handed a form quickly and it is quickly read and he is told to sign the form. Sometimes he doesn't sign. We submit at this time that there was no or nothing understandingly, there was nothing knowingly done by this man. Only, that he had had this attorney, this would be unnecessary today. If he had had his attorney or if the attorney had been informed then this whole thing would not be necessary.

THE COURT: Do you have any case to the effect that in a Court request for a Court appointed counsel nullifies any waivers of presence of counsel at any police interrogation made thereafter.

MR. WILLIAMS: Your Honor, we basically go to the Miranda.

THE COURT: Well, I don't think the Miranda specifically answers that question.

MR. WILLIAMS: And then right after that Miranda we have the *U. S.* versus ***Kingsman*** at 5 42nd at 1017 and there is where the Court said that they do recognize that there is the different assertion of the right to remain silent and an assertion of the desire to consult with his [98] counsel and an indication of a desire to consult with counsel does reveal that the accused feels somewhat incompetent to deal with the police without prior legal advice and this does not require per se perclusion of a renewed interrogation, but rather necessitates a more careful scrutiny of the individual's last choice to waive his rights and speak to the authorities.

THE COURT: Yes, I have read that, but what we have here is a request for Court appointed counsel made in the courtroom. Now, I assume that it does not involve that kind of request for counsel and what they are referring to is request of counsel made at the time of interrogation. Now, does the request for appointment of counsel in a court proceedings carry over and nullify then any request for counsel at the time of the interrogation or nullify the waiver?

MR. WILLIAMS: Your Honor, we submit to the Court at this time that at the time that the man asked for a counsel after I explained that he was indigent and it was explained to counsel that counsel could be provided for him that certainly because there was such a time lag between the time that the lieutenant and sergeant talked to him.

THE COURT: I realize that, but can you answer my question. Do you have a case that said that that request in Court carries over and nullifies any waiver of [99] counsel at a subsequent police interrogation just because he asked for counsel in Court?

MR. WILLIAMS: Your Honor, we have a case that says that the authorities should have been diligent in seeing that this man receive counsel.

THE COURT: Because he had asked for it back in Court?

MR. WILLIAMS: They should have been diligent in getting an attorney.

THE COURT: And waived it at the time of interrogation?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: Then they should still get him an attorney?

MR. WILLIAMS: That was the basic question that he stated after they read his rights to him. I've requested for an attorney but everybody ignored this man and just proceeded to question him anyhow.

THE COURT: I understand the facts. I understand the testimony. I just want to know if you have got a case on point?

MR. WILLIAMS: We just say the same one we submitted that that was a critical stage of the proceedings and this was brought out by—

THE COURT: I have read your brief also.

[100]

MR. WILLIAMS: Well, we submit on the brief then, Your Honor, because what we put in the brief is what we brought forward to the Court.

THE COURT: Anything Mr. Grant?

MR. GRANT: Yes, I just received the brief. I have read it. I do have some cases. I would site to the Court and this is not the first time we have been down this type of road in Michigan. And, as a matter of fact it is not the first time down the road in this Court. Similar situations and similar Walker hearings. I site today the case of Moore found out of 51 Michigan Appeals 48 a 1974 case which deals with a somewhat similar case where the defendant made three statements after he had hired or gotten a Court appointed attorney, after at least the first one being very similar to the situation here, that being that he had an attorney. And everybody knew that he

had an attorney. I believe he had hired an attorney in this case and an officer still went and spoke with him after advising him of his rights and of course he was then convicted also and he appealed on that basis. Similar to the issue that appears here, and at that time had at page 50 of the decision of People versus Moore and I quote, "The Court rejected his argument concerning his statements and that they should not be used because they had an attorney and an attorney was never notified and I quote defendant contends the Court errored [101] in admitting three post arrest statements to the policemen." The primary objection is based upon the fact that each time the statement was made his Court appointed attorney was not present or consulted before the statements were given. Before giving the first statement the defendant was read his Miranda rights and this is after a Court appointed attorney. Thereafter, he told the officers he was framed but refused to name the person involved without counsel. Questioning ceased. Now, thereafter he requested a conference with the police captain and he made another statement. That's because — that would be voluntary. What we are concerned with is the — he was advised of his Miranda and he waived those rights even though he had a Court appointed attorney and even apparently still waived his rights and wished to make a statement. That statement was used against him and the Court then continues on the fourth paragraph down and the defendant may make statements without the presence of an attorney under certain circumstances. In the first statement he was read his rights and then made the statement according to Miranda, the statement is admissable and then they go into the second statement and that is similar to what they have here as long as he has

been properly advised of his rights he understood and knowingly and knowledgeably waives those rights. Those statements are good under this case as well as the next couple of cases I will site. We have somewhat of a similar [102] situation in *People* versus *Sparks*. Although, there is not a Court appointed attorney, the defendant said he didn't want to make a statement. An hour and a half later he was advised of his rights again and he originally said he would make no statement. He wants an attorney on the ride to the city which took approximately an hour and a half, and the detectives after waiting an hour again advised him of his rights and at that time he said he understood and would make a statement, and he made a statement, and that was used against him. Again, in a murder trial in Court and it was appealed. The decision in that case is very similar to what we have here. He was properly advised of his rights and that he can knowingly make a waiver and as long as knowledgeably it is done at a later time, as long as it is not in a matter of moments, but sometime after he originally made his request. The Court said in Sparks concerning that request for counsel and I quote "The immediate, the instant passage can't be read as permitting resumption of this interrogation after a momentary repute for that would be violence of handling requiring interrogation to ask questions until an attorney is present." However, passage may be read in later interrogations after a significant period of time to hold that the counsel's right then never being knowingly and intelligently, after having arrived, and asserted would tend to deny defendant's right to speak without the aid of counsel.

[103]

And, we therefore, hold that when a person asserts his right to counsel the interrogation must cease until the

attorney is present or after the lapse of a significant period of time the person knowingly and intelligently waives his counsel's rights. And they also cite then in File 44 Federal Supplement, Federal Second 353, pages 367 to 368. While that is not exactly the same circumstances we are talking about, the same situation, it's not a matter of him being constantly in question and being interrogated, and we have a matter of days intervening before Lieutenant Lowe goes over and speaks to the defendant. Also with Sergeant Wheeler, and after properly advising of his rights not only the original acknowledgment and waiver of the Miranda rights which is signed at that time by Mr. Bladel, but also the second sheet when he does affix his own writing in a written statement and there is an acknowledgment on there. The officer's testified that he was again advised of that right, including all of the Miranda warnings within a paragraph and he went ahead and made a written statement.

The defendant says he was never told that, but he acknowledges that he is well aware of all of his Miranda warnings from prior contact even before he came into custody of the City of Jackson Police Department on January 1, so none of these things are surprising to him. He just gives reasons why he feels that this should not stand up.

[104]

I submit to the Court that quite clearly there has been a proper advisement of Miranda warnings in all circumstances and in particularly on March 2, he was properly advised. He was asked questions not as Mr. Williams would have them believe. We ran through the testimony from the officers and that is they asked him

at the end of each statement, do you understand and he says, yes or yeah, or some words affirmatively, and when we get to the last one and the testimony is do you understand if you want an attorney present you may have one and do you want an attorney and while we speak to you and he said, "No, I don't need an attorney, I will go ahead." And later on, he said in a written statement, and I will plead guilty and although he knew what he was doing at that time, and knew the questioning would have ceased. And in the U.S. Supreme Court Case, Your Honor, of *Brewer* versus *Williams* found at 430 U.S. 387, I have the law cite which is 51 Law Addition, 2nd page 424 and I am going to quote from page 439 concerning an intelligent waiver after there has been an appointment of counsel or hired counsel and the Court says at the top of column 2 or 439 and I quote, "This Court states, an accused can voluntarily, knowingly and intelligently waive his right to have counsel present. After counsel has been appointed prosecution, however, has the waiting obligation to show that the waiver was knowingly and intelligently made."

We quite agree with Judge Hanson that the [105] state here failed to do so. And they say and cite 509, Federal 2nd at page 233, which I believe is the Federal case. I cited to the circumstances, the factual circumstances th[illegible] are different and that case got overturned and obviously the situation is where there is a Court appointed attorney and the burden is on the prosecutor to show that there was an acknowledgment and a knowing waiver of the rights and that's exactly what we contend here and in fact, Lieutenant Lowe and Sergeant Wheeler notified the defendant of his rights. He knew what they were anyway. He didn't need it told to him all the time.

Nevertheless, we go through all of the rights, each one in turn and he answers he understands it. He answers he doesn't want an attorney present. He goes ahead then and talks with them and he even in this case signs acknowledgment and waiver but it's a little — he says he didn't sign it. I guess the next logical conclusion if he is going to go ahead and at that, if he wants to say something even if we accept his testimony he makes a statement he then signs another acknowledgment and writes out a written statement and our contention is quite clearly we have shown that he was knowingly making a waiver and he was properly advised of his rights and there is nothing more than that, that could have been done to make known to him what his rights were and he apparently understood them from the testimony. He certainly appeared to understand what was going on at the time and you recall the testimony from the [106] officers he didn't just blurt out, he would sit back and think and then as in answering the questions or any of the questions he gave to the counsel.

It is our contention we have met the burden laid upon us by the Supreme Court and in fact all of the statements are admissible under the various cases and rulings that have been laid down. Thank you.

THE COURT: Any reply Mr. Williams?

MR. WILLIAMS: Just briefly, Your Honor. The interpretation from when a defendant knowingly waives his rights, he has through the Miranda I think when counsel is appointed we take this to mean that the counsel was appointed. The counsel has knowledge, he was appointed and that counsel has an opportunity, whether he did it or not but has had the opportunity to see the client and in

this case there was no connection just in an appointment on the 23rd and the defendant or the attorney knew anything about each other or when they were going to defend and I think this takes it totally out of line of all cases. Of all cases, and perhaps it may be that it will end up being a landmark case, but in this case we are just stating that although counsel was appointed on the 23rd, counsel had no knowledge nor did the defendant. The defendant testified that even on the 26th he didn't know whether he had an attorney and neither did the police officers. All he knew is that he had requested an attorney and no one [107] had any information for him and neither had the attorney. I would make the interpretation that when they say counsel is appointed that there is some knowledge by the appointed counsel that he has been appointed. Not just a piece of paper that says you are appointed. The knowledge to the attorney or the knowledge to the defendant should make a difference as in this case in front of the Bench now. The difference being is no one knew of the appointment. No one knew of the appointment. And, we are asking a man that has been sitting in jail not knowing anything, that he is pulled out on the 5th day or 6th day of his arrest, 5th day of the arrest or 4th day of the arrest and shipped down and told again; okay, here is your rights; and first thing he asks for is his attorney and no one knows anything about it. No one knows one thing about the attorney. The defendant doesn't know anything about being appointed and neither does the attorney have any knowledge that he was appointed. There has been no connection between this defendant and his attorney and then we are saying because counsel was appointed then that means an appointment can be held up until they

talk to this man two or three weeks, until they get what they want and then send an attorney in.

THE COURT: All right, thank you. Well, as to the interrogation of January 1, 1979, the Court finds that the prosecution has borne the burden of showing that that was a voluntary statement such as it was based upon the proper [108] advice of the defendant or to the defendant of his Miranda rights and that he knowingly and voluntarily, orally waived them. And, the same applies as to the statement interrogation of January 2, 1979.

As to the statements and confessions of March 26, 1979, the Court also finds that the rights were properly given to the defendant and that he knowingly waived them after acknowledging that he understood them.

Now, I understand the position of the defendant to the effect that he did demand counsel on March 23rd at his arraignment in District Court. Now whether or not counsel was appointed by March 26th, incidently, March 23rd, 1979 was a Friday and March 26th, 1979 was a Monday. And, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does affect the voluntariness and the affectiveness of the waiver of the rights.

Now, I don't know of any case why counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant that he shouldn't say anything or that he should not say anything without the presence of counsel. But, there is no case that I know of that says Miranda goes that far and so the holding is that the testimony or the substance of the statements of

all [109] three occasions and the confessions will be admissible.

MR. GRANT: Would that also be true of March 22 when Detective Rand spoke with the defendant after he had been brought back to Elkhart and made allegations that he had thrown the gun away sometime ago? There is only three sheets.

THE COURT: Yes, that's right.

MR. GRANT: There is a waiver?

THE COURT: There is no waiver for the second of January.

MR. GRANT: That's right.

THE COURT: Yes, the one on the 22nd would also be admissible.

MR. GRANT: Thank you, sir.

THE COURT: The 22nd of March.

MR. GRANT: We also at this time take up the motion I filed for fingerprint impression for we have some fingerprints that have been located on the murder weapon and his finger types were not taken as type prints and they are generally not taken when a person is printed. I have notified defense counsel that is possibly exculpatory which I contend we have a right to do this since this is the physical evidence. I have filed this motion and we don't want to go into abusing them, so, we are asking that his finger types be taken by the Court and sent to the Department [110] of State Police Laboratory in Lansing.

THE COURT: Any objection Mr. Williams?

MR. WILLIAMS: No objection.

THE COURT: Yes, that may be done.

MR. GRANT: Thank you.

(WHEREUPON, THIS MATTER WAS CONCLUDED AT 12:00 P.M.)

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[111]

STATE OF MICHIGAN)
) ss
COUNTY OF JACKSON)

I, Barbara A. Bostrom, Acting Official Court Reporter, do hereby certify that I reported the foregoing proceedings, held before Judge Noble, on 2July 5, 1979, and that the proceedings is a full, accurate, and correct record of my stenotype notes.

/s/ BARBARA A. BOSTROM
Barbara A. Bostrom

June 8, 1980
Mason, Michigan

No. 84-1539

In The
Supreme Court of the United States
October Term, 1984

STATE OF MICHIGAN,

Petitioner,

v.

RUDY BLADEL,

Respondent.

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED March 28, 1985
CERTIORARI GRANTED May 28, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

Rudy Bladel was convicted by jury trial for the murders of three individuals. Admitted at trial was a statement made by Respondent during custodial interrogation. The interrogation occurred after arraignment in the State District Court wherein Respondent requested court appointed counsel. Respondent was advised of and waived his "Miranda Rights" prior to making the statement. The Michigan Supreme Court found that the interrogation violated Respondent's Sixth Amendment right to counsel and reversed the convictions. The questions presented are:

1. Whether the Michigan Supreme Court erred when it held that police interrogation of a criminal defendant after District Court arraignment was a critical state in the proceedings such that the Sixth Amendment right to the presence of counsel is applicable?

2. Whether the Michigan Supreme Court erred in holding that the Sixth Amendment of the United States Constitution requires a "bright line" rule prohibiting police initiated interrogation after a criminal defendant has requested appointment of counsel at initial arraignment?

3. Whether the interests protected by the Sixth Amendment right to counsel and the "Fifth Amendment right to Counsel" during interrogation are sufficiently similar such that a knowing and intelligent waiver of Fifth Amendment "standard Miranda Rights" also constitutes a knowing and intelligent waiver of a criminal defendant's then existing Sixth Amendment rights?

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court is published at 421 Mich 79; 365 NW2d 56 (1985). The Michigan Supreme Court's prior remand order is published at 413 Mich 864; 317 NW2d 855 (1982). The Opinions of the Michigan Court of Appeals are published at 106 Mich App 397; 308 NW2d 230 (1981) and 118 Mich App 498; 325 NW2d 421 (1982). The Opinion of the Circuit Court was neither published nor written, but is contained in the Joint Appendix pp 114a-115a.

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JURISDICTION

The judgment of the Michigan Supreme Court was released on January 29, 1985. The Petition was filed less than 60 days from the date aforesaid. The Petition was granted on May 28, 1985. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defence."

Constitution of the United States, Amendment XIV, Section 1:

> " . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Respondent was convicted of the December 31, 1978 shotgun slayings of three railroad employees at the train depot in Jackson, Michigan. Respondent, a prime suspect in the slayings, was questioned by the police on January 1, 1979 and January 2, 1979. Before each interview Respondent was advised of his "Miranda rights" which he waived each time. (JA 12a, 15a, 17a R 528, 532). During the first interview Respondent admitted that he was present in Jackson on December 31. (JA 16a R 530). In the second interview he admitted that he had gone into the train depot on the day of the murders, but did not admit any involvement in the murders. (JA 18a-21a R 533-537).

There was no further police contact with Respondent until March of 1979 when a shotgun was found on the outskirts of Jackson and was scientifically determined to be the murder weapon. Federal firearms records showed that Respondent had purchased the shotgun in Indiana. (R 538). A warrant was issued for the arrest of Respondent. He was arrested in Elkhart, Indiana on March 22, 1979. (JA 22a). Respondent waived extradition from Indiana. (R 539, JA 29a-30a). During the waiver hearing, Respondent was advised of, but declined, the right to representation by counsel. (R 539, 572, 683-684, JA 29a-30a).

Respondent was not questioned about the crime until he arrived back in Jackson on the 22nd. That evening, from 9:21 p.m. until 10:47 p.m. Respondent was interviewed by Jackson Police. (R 540-575). Prior to this interview, Respondent was advised of his rights including his right to consult a lawyer before answering any questions, to have a lawyer present during questioning, the

right to have an attorney appointed and an absolute right to stop the questioning at any time. (R 541-542, JA 22a-26a). Detective Rand also read to Respondent a written rights form which Respondent also read. Respondent signed the acknowledgment and waiver portion of the advice of rights form (indicating that he would talk to the police) and waiving the presence of an attorney. (R 542, JA 26a). This questioning was terminated when Respondent failed to answer any further questions. (R 545, JA 28a).

The Respondent was arraigned in District Court on March 23, 1979, at about 10:35 a.m., in the presence of Detective Rand. (JA 2a). The pertinent events at arraignment are recorded as follows:

THE COURT: Now, because these are very serious charges which are brought against you, have a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right sir. I'll place an affidavit in the file for you to make

> out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?
>
> THE DEFENDANT: Right sir.
>
> (JA 3a-4a).

On March 26, 1979, Sergeant Richard Wheeler and Lieutenant Ronald Lowe interviewed the Respondent in the County Jail. (R 589, JA 39a). The Respondent was given a copy of an advice of rights form to read while Wheeler read another copy to Respondent. (JA 40a). The Respondent was advised of each right individually. (JA 40a-41a). He responded affirmatively when asked if he understood each right. (JA 40a-41a). Respondent was then read the waiver portion of the form, which he indicated he understood. Respondent signed the waiver and said he did not want an attorney present at that time. (JA 41a). At no time during the interview did the Respondent ask to have any attorney present or to contact an attorney. (JA 43a). Neither Wheeler nor Lowe were aware of Respondent's request for appointment of counsel made at arraignment until Respondent told them at the point during the advice of rights when counsel is mentioned. (JA 47a-48a). Respondent was then specifically asked if he wanted an attorney present at that time and the Respondent stated, "No." (JA 49a). Wheeler testified that when the Respondent mentioned that he had asked for court appointed counsel Wheeler asked Respondent

if he wanted an attorney present, to which Respondent replied, "I do not need one." (JA 52a). Lieutenant Lowe testified to this recollection of the events:

> Mr. Bladel at that time stated that he had requested an attorney at his arraignment, but he hadn't seen him, seen the attorney yet, but he would talk to us, and he said he would talk to us, and he said he didn't need his attorney there while he was talking to us. (JA 55a).
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> Q. Was there any mention of an attorney at this time?
>
> A. I asked him if he desired his attorney present and he stated he did not need one.
>
> Q. What, if anything, further took place then?
>
> A. In addition to the last statement that Mr. Bladel said, when I asked him if he needed his attorney present he stated, 'I don't need him present. I'm going to plead guilty anyway.' (JA 62a).

During this interview, Respondent confessed to the three murders, orally and in writing.

Respondent did not have any contact with his attorney until the day after his confession. (JA 76a). In addition to the times he was advised of his rights in connection with this case, Respondent had been advised of his rights previously and was aware of his rights from this past experience. (JA 80a).

After hearing the testimony at the *Walker* hearing, the trial court found the confession admissible:

> Now I understand the position of the Defendant to the effect that he did demand counsel on March 23 at his arraignment in District Court. Now, whether or not counsel was appointed by March 26, incident-

ly March 23, 1979 was a Friday and March 26, 1979 was a Monday, and, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does effect the voluntariness and the effectiveness of the waiver of the rights.

Now, I don't know of any case why (sic) counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant that he should not say anything without the presence of counsel. But, there is no case that I know of that says *Miranda* goes that far so the holding is that the testimony or the substance of the statements of all three occasions and the confessions will be admissible. (JA 114a-115a).

The Michigan Court of Appeals affirmed following the reasoning of the Fifth Circuit cases of *Nash v Estelle,* 597 F2d 513 (5th Cir 1979) and *Blasingame v Estelle,* 604 F2d 893 (5th Cir 1979). *People v Bladel,* 106 Mich App 397; 308 NW2d 230 (1981). The Michigan Supreme Court, in lieu of granting Respondent's Application for Leave to Appeal, remanded to the Court of Appeals for reconsideration in light of *People v Paintman* and *People v Conklin,* 412 Mich 518; 315 NW2d 418 (1982), decided in the interim, which adopted this Court's holding in *Edwards v Arizona,* infra. *People v Bladel,* 413 Mich 864; 317 NW2d 855 (1982). On remand, the Court of Appeals summarily reversed concluding that *Paintman* and *Conklin* supra, read in light of the remand order "compelled" reversal. *People v Bladel,* 118 Mich App 498; 325 NW2d 421 (1982).

The Michigan Supreme Court granted Petitioners Application for Leave to Appeal on the issue that the confession in the instant case was not taken in violation of Respondent's Fifth Amendment rights. The Michigan Supreme Court agreed that Respondent's Fifth Amendment rights were not violated, but held that Respondent's Sixth Amendment rights were violated by police-initiated interrogation after Respondent had requested court appointed counsel at his initial arraignment. The Court concluded that the Sixth Amendment precludes further police-initiated interrogation after a request for counsel is made to a judicial officer by "analogy" to this Court's case of *Edwards v Arizona* infra, which requires such preclusion under the Fifth Amendment where the defendant requests counsel during custodial interrogation.

SUMMARY OF ARGUMENT

Respondent's confession was properly admitted at trial. Prior to his confession, Respondent was advised of his rights by way of "Miranda Warnings". Respondent indicated he understood his rights, including the right to the presence of counsel, and he signed a waiver of those rights. There was no physical or psychological compulsion used to obtain Respondent's confession. There was no violation of Respondent's Fifth Amendment rights.

Police-initiated interrogation was not prohibited even though Respondent had requested appointment of counsel at his District Court arraignment which preceded the interrogation. *Edwards v Arizona,* 451 US 477 (1981) prohibits police-initiated interrogation after a criminal defendant has invoked his right to the presence of counsel during interrogation. Respondent's request for appointment of counsel, under the facts of this case, related only

to representation during judicial proceedings. Therefore, further police-initiated interrogation could not badger Respondent into unwillingly relinquishing a right previously asserted and *Edwards* was not violated.

At the time of the challenged interrogation, Respondent had only been arraigned in District Court which had no jurisdiction to render a final determination of guilt. Therefore, no critical stage of the proceeding had been reached and Respondent's Sixth Amendment rights had neither attached nor could they have been violated.

If Respondent's Sixth Amendment rights had attached, those rights were waived prior to the counselless interrogation. As concerns pre-trial interrogation, the scope of the Sixth Amendment right to counsel is the same as the Fifth Amendment - Miranda right to counsel. The voluntary waiver of the right to the presence of counsel after Miranda warnings sufficed as a waiver of whatever right to counsel Respondent enjoyed at that moment regardless of the Constitutional source of that right.

There is no reason to create an *Edwards* type rule to preclude police-initiated interrogation after a request for appointment of counsel at initial arraignment where that request does not indicate a desire to deal with police only through counsel. Criminal defendants may well want the aid of counsel during judicial proceedings yet still desire to confess to police. Police-initiated interrogation does not risk unwilling relinquishment of a right previously invoked because the right to the presence of counsel during interrogation had not been invoked by Respondent's request for appointment of counsel. Society's interest in prompt and efficient law enforcement is advanced by allowing such interrogation. The burden placed on the criminal defendant is minimal; he need only invoke his right to the presence of counsel when he is asked, before interrogation, if he is willing to waive that right. Post-initial arraignment police-initiated interrogation should be allowed.

Unlike this court's "bright line" cases which are designed to clarify the constitutional constraints on police activity, a rule prohibiting police-initiated interrogation after a request for counsel at arraignment only obscures. "Bright line" cases share the common elements of police presence at the event and control of the situation. Police are not always present and are never in control of arraignment procedures. To control police conduct in accordance with events they may not observe, or procedures they do not control and the significance of which they may be uncertain, would not only give little guidance, but would significantly increase the risk that reliable confessions would be suppressed because the constable bungled. Such a rule would engender disrespect for the law and the administration of justice and thus, should not be adopted by this court.

ARGUMENT

Before becoming enmeshed in the Constitutional questions presented by this case, it is important that the analytical place of beginning be established. Just as the traveler must first plot his own location so that he can properly set his azimuth for his destination, the would-be

constitutional sojourner must firmly place his feet on the bedrock of the Constitution with eyes firmly fixed on the path of justice which our system demands.

That portion of the constitutional foundation upon which the analysis of the present questions must be built is the cornerstone at which the interests of society over against those of the individual intersect and are balanced. The founding Fathers recognized that, in the society they were building, neither the interests of society nor the individual could dominate to the exclusion of the other. The Constitutional Convention in its letter to Congress of September 17, 1787 recognized the challenge of establishing balances between individual and societal rights and their similarity to the balancing of Federal and State interests. The Convention wrote:

> —individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; . . .[1]

The balance of the competing individual and societal interests embodied within the Constitution is a composite of the multifarious ideologies which composed the colonial mind and found harmony in the theme of liberty.[2] This concept of ordered liberty rejected both the anonymity of

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[1]Clinton Rositer, *The Grand Convention,* The New American Library, Inc. New York, New York, 1966 Pages 342-343.

[2]Clinton Rositer, *The First American Revolution,* Harcourt, Brace, & World, Inc., 1956, Pages 188-191.

the individual characteristic of monarchical and aristocratic government and exultation of the individual found in anarchy and even to some degree in our own Articles of Confederation.

Equally important to the establishment of constitutional principles was the colonial view of the nature of Man which was a matter of considerable controversy.[3] Despite the areas of disagreement, the general impact of the Enlightenment prompted a high view of Man. Metaphysically, Man was viewed as both rational and free, thus, as a free moral agent, responsible for his actions. This view of Man is fundamental to our criminal justice system which establishes a standard of behavior and authorizes society at large to punish the individual for failure to attain that standard.

Despite the fact that the foundational balance between individual and societal rights has already been established by the framers of the Constitution, this court has been regularly called upon to engage in the balancing of interests between the rights of society and the criminal defendant. As the late Chief Justice Warren stated in *Spano v New York,* 306 US 315; 315-316 (1959):

> As in all such cases, we are forced to resolve the conflict between two fundamental interests of society; its interests in prompt and efficient law enforcement, and its interests in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.

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[3]Clinton Rositer, *The Political Thought of the American Revolution,* Harcourt, Brace & World, Inc., New York, 1963, Pages 95-114.

It is apparent from the quotation from *Spano* that this court's role in the balancing of interests between society and the individual involves the balancing of rights in ever changing circumstances in accord with the unchanging balance established by the principles embodied in the Constitution.

The Interests Of Corporate Society

The fundamental interest of corporate society is for prompt and efficient law enforcement. *Spano, supra.* The result of prompt and efficient law enforcement is conviction of the guilty. To accomplish conviction of the guilty, law enforcement officials must have available all means which produce reliable evidence without impingement of the criminal defendant's constitutional rights.

One of the most important sources of evidence is the defendant himself. The court has recognized the value of confessions on several occasions:

> Indeed, far from being prohibited by the Constitution, admissions of guilt by wrong-doers, if not coerced, are inherently desireable. *United States v Washington,* 431 US 181, 185 (1977).

In *Massiah v United States,* 377 US 201, 207 (1964), this court recognized that it was appropriate for government agents to continue investigation of a defendant's activities even after the defendant had been indicted. Since statements from defendant's are an appropriate object of governmental investigation, the fundamental interests of society are furthered, at no cost to the rights of the defendant, when, as in the instant case, government officials obtain a voluntary confession from the defendant

whether before arrest or after indictment. The inconsistent holding of the Michigan Supreme Court should be reversed.

As the focus turns towards the rights of the individual defendant, the words interrogation and counsel contained in the facts of this case draw attention immediately to the Fifth Amendment guarantee against compelled self-incrimination and the Sixth Amendment guarantee to the assistance of counsel as both of these protections have been applied to the States through the due process clause of the Fourteenth Amendment.

The Fifth Amendment

The core protection afforded by the Fifth Amendment, clear from the language of the Amendment itself, is that a criminal defendant cannot be "compelled in any criminal case to be a witness against himself . . .". This portion of the Fifth Amendment has two key aspects: it applies to testimonial evidence, obtained by compulsion. *South Dakota v Neville,* 459 US 553, 562 (1983). *Fisher v United States,* 425 US 391, 397 (1976). At its root, the Fifth Amendment privilege was designed to protect against both unreliable evidence which can result from compelled statements and to avoid the indecency of such proceedings as the inquisitorial court of Star Chamber, where failure to give self-incriminating testimony resulted in a breach of the Star Chamber oath and consequent punishment. *Miranda v Arizona,* 384 US 436, 458-460 (1966).

The consistent liberal construction of the Fifth Amendment applied by this court has resulted in the expansion of the protection of the Fifth Amendment beyond the

courtroom to custodial interrogation such as that at issue in the instant case. *Miranda,* 384 US 436, 360-361.

At least in the view of its author, *Miranda* did not create new substantive rights but merely developed the procedural requirements designed to provide "practical reinforcement" for the Fifth Amendment rights. *New York v Quarels,* 467 US —, —; 104 SCt 2626 (1984). The reinforcement was designed to off-set the presumed inherent, psychological compulsion present in custodial interrogation. *Oregon v Elstad,* 470 US —, 84 LE2d 222, 229 (1985). The aim of the *Miranda* warnings was to give an objective basis for the determination of whether the Fifth Amendment right, as articulated in *Miranda,* had been waived under the standard articulated by this court in *Johnson v Zerbst,* 303 US 458 (1937).

The procedural right articulated in Miranda of particular relevance to the instant case is the right to the presence of counsel during custodial interrogation. The Fifth Amendment right to counsel is a narrow one. It is the right to "confer with or have counsel present before answering any questions" during custodial interrogation. *Blasingame v Estelle,* 604 F2d 893, 896 (Fifth Circuit, 1979). The Fifth Amendment right to counsel is designed to protect a defendant in the exercise of his right to remain silent assuring that any statements are not obtained through coercion or trickery. *Berkemer v McCarty,* — US —; 104 SCt 3138, 3150, Note 27; 82 LE2d 317 (1984).

The *Miranda* warnings were not designed to prohibit confessions, rather they were designed to insure that any confession made is uncoerced. As this court said in *Wan*

v United States, 266 US 1, 14-15(1929) and reaffirmed in *Miranda,* 384 US 436, 462, "a confession may be given voluntarily, although it was made to police officers while in custody and in answer to an examination by them." Thus, the question to be resolved in the Fifth Amendment aspect of the analysis of this case is whether the confession given by Respondent was voluntary under the standards articulated in *Miranda.*

There is no record evidence of any physical punishment or deprivation used to manipulate the defendant into confessing, thus, there was no physical coercion which would vitiate the voluntariness of defendant's confession. Secondly, as testified to during the *Walker* hearing, Respondent was carefully advised of his Fifth Amendment rights in accordance with this court's opinion in *Miranda.* With each portion of the advice of rights, defendant was asked if he understood the right explained and if he was willing to waive those rights. Respondent indicated that he understood his rights and wished to waive them. Ultimately, defendant signed a written waiver of his constitutional rights which is indicative of a voluntary waiver. *North Carolina v Butler,* 441 US 369, 373 (1979).

Respondent was specifically advised of his right to have counsel present during interrogation and when asked if he desired to have an attorney present, he stated "I don't need him present. I am going to plead guilty anyway." (JA 62a). The facts of this case demonstrate that Respondent was fully advised of his rights such that any waiver was knowingly and intelligently made. As well, since any psychological conclusion was overcome by the advice of rights and since there was no physical compulsion involved, defendant's waiver of his constitutional

rights and subsequent confession were voluntary and the trial court properly admitted the evidence. On this point, all agree.

Edwards v Arizona Was Not Violated

The real controversy in this case arises over the implications of the fact that the confession was obtained after defendant had requested appointment of counsel at his initial arraignment. The Michigan Supreme Court held that the request for appointment of counsel at arraignment precluded further police-initiated interrogation through analogous application of this court's decision in *Edwards v Arizona,* 451 US 477 (1981). Though the Michigan Supreme Court rightly held that there was no Fifth Amendment violation and thus no direct violation of *Edwards v Arizona,* which was limited by this court to Fifth Amendment analysis, it is appropriate to briefly address the question of the Fifth Amendment implications of the arraignment request for counsel.

This court's decision in *Edwards v Arizona,* was a clarification of the statement in *Miranda* that upon an accused's request for the presence of counsel, "the interrogation must cease until an attorney is present." *Miranda, supra,* 384 US at 474. In *Edwards,* during custodial interrogation conducted by police, defendant requested the presence of his counsel. *Edwards, supra,* 458 US at 479. At that point, interrogation was terminated but the next morning, a guard came to Edwards' cell to inform him of the detectives' desire to talk to him. Edwards replied that he did not want to talk, but the guard told him that he had to. *Edwards, id.* The guard took Edwards to meet with the detective. Edwards was advised of his

"Miranda rights" which he waived. Edwards then confessed. *Edwards, id.*

Mr. Justice White's opinion in *Edwards* focused on what constitutes a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards, supra,* 451 US at 482; 101 SCt at 1884. A defendant cannot, in the legal sense of voluntariness, waive his right to counsel unless he knows and fully understands that right. Police conduct in the *Edwards* case brought into question whether the relinquishment of the right to counsel was knowing and intelligent. The effect of the Miranda Rule is to make the police the legal advisor of a defendant in the initial phase of custodial interrogation. Thus, Edwards was depending on the police as the source of his knowledge of his legal rights. Edwards certainly could have been confused as to what his rights were because of inconsistent police conduct.

The initial cessation of interrogation upon Edwards' request for counsel would indicate tc Edwards that the right to the presence of counsel truly did exist and that the police would honor that right. However, the later reinterrogation (especially in light of the comment of the jailer that Edwards must talk) was at least an implicit statement by the police that defendant did not have the right to the presence of counsel at interrogation or at the very least that they would not honor that right if it existed. This inconsistent police conduct could bring confusion into the defendant's mind precluding a knowing and intelligent waiver.

Additionally, the waiver in Edwards is drawn into question because police-initiated reinterrogation is a re-

quest by police that the defendant abandon in its totality the very specific and narrow right to the presence of counsel that the defendant had previously invoked. Inconsistent behavior is asked of the defendant. Thus, the voluntariness of this confession is called into question because any change of mind by defendant has come at the behest of the police. Reinterrogation in the circumstances of *Edwards* directly impinged upon the defendant's Fifth Amendment right to the presence of counsel as established in Miranda.

As recognized by this court in *Edwards,* the request made by Edwards "expressed his desire to deal with the police only through counsel . . ." *Edwards, supra,* 451 US at 486. The reappearance of police without the presence of counsel impinged on that right. The *Edwards* rule is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers" who repeatedly attempt to persuade the defendant to relinquish his rights. *Oregon v Bradshaw,* — US —; 103 SCt 2830, 2834 (1983). Thus under *Edwards* a confession obtained after a defendant had requested to deal with police only through counsel can only be voluntary if the reinterrogation is initiated by the defendant and is followed by voluntary waiver of his Fifth Amendment rights.

The question to be resolved in the instant case is whether Respondent's request at arraignment for appointment of counsel is the type of invocation of the right to counsel which indicates a desire to deal with police only through counsel and which requires the prophylactic rule of *Edwards* to protect the defendant's constitutional rights.

Both *Miranda* and *Edwards* dealt exclusively with the setting of police-initiated interrogation. In each of those cases, the only right to counsel which the defendant enjoyed at the relevant time was the Fifth Amendment right to have counsel present during custodial interrogation. In *Edwards,* the defendant invoked this right, but after a delay the police reinitiated interrogation. Thus, there was a narrow right invoked in its fullest extent, which the defendant was later asked to waive. In the instant case, defendant never invoked his right to have counsel present during interrogation. As noted in the Statement Of The Case, defendant was interrogated numerous times before his arrest and on a couple of occasions after his arrest. At each time, defendant was advised of his *Miranda* rights which he waived. The only time that defendant requested counsel was during his arraignment. In order to understand the nature of the right invoked by defendant at the arraignment, the arraignment transscript must be reviewed. The following occurred at Respondent's arraignment:

> THE COURT: Now, because these are very serious charges which are brought against you, you have a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. I'll place an affidavit in the file for you to make out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?

THE DEFENDANT: Right sir.

(JA 3a-4a).

The right which Respondent invoked at arraignment was only that right which was explained to him by the arraigning Magistrate. The right explained by the arraigning Magistrate was only the right to have counsel represent Respondent at the preliminary examination and thereafter in the judicial proceedings. The arraigning Magistrate in no way expressly or impliedly indicated that the scope of the right to counsel which would be invoked by a request for the appointment of counsel related to police interrogation. There is nothing in this record to indicate the defendant desired to deal with police only through counsel.

Since defendant had at no time indicated a desire to deal with police only through counsel, there could be no badgering by police as was the case in *Edwards,* and thus no need for a prophylactic rule to assure preservation

of the defendant's rights. As the Michigan Supreme Court properly held, there was no invocation of defendant's Fifth Amendment rights at the arraignment and therefore there could be no violation of defendant's Fifth Amendment rights by the further police-initiated interrogation. Petitioner contends that that conclusion is accurate.

Despite the Michigan Supreme Court's sound reasoning on the Fifth Amendment question, it nonetheless boldly stepped out into new ground and reversed defendant's conviction claiming that admission of the confession obtained after request for counsel at arraignment was a violation of defendant's Sixth Amendment rights. Again, the proper analysis of the Sixth Amendment interests involved in this case requires a brief historical development of the Sixth Amendment right to counsel and then the application to the instant case.

The Sixth Amendment

The Sixth Amendment cases dealing with the scope of the right to counsel during interrogation have not been so clearly synthesized into comprehensive rules like has been done for the Fifth Amendment right to remain silent. Since this is primarily virgin territory, careful analysis of the Sixth Amendment right to counsel and its implications in the instant case is necessary.

This court in *United States v Ash,* 413 US 302 (1973), cast the mold for the appropriate analysis of Sixth Amendment questions. The history of the Sixth Amendment must be examined so that the immutable protections which carry the lasting importance of the Sixth

Amendment right to counsel can be properly applied to the ever changing criminal justice system. The accepted history of the Sixth Amendment as recorded in this court's cases begins most notably in *Powell v Alabama,* 287 US 45 (1932).

The most significant aspect of Sixth Amendment history developed in *Powell* was that the simple words "to have the assistance of counsel for his defense" in the Sixth Amendment was a repudiation of the common law rule that denied criminal defendants the right to the assistance of counsel in felony cases. *Powell, supra,* 287 US at 60. In *United States v Ash,* 413 US 305 (1973), this court reexamined the historical foundations of the Sixth Amendment. In *Ash,* this court concluded that the right to counsel was designed to "minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Ash, supra,* 413 US at 309. Simply put, the Sixth Amendment recognizes that the average defendant does not have the experience and education which would put him on an equal footing with a skilled prosecutor.

The historical analysis engaged in in *Ash* led this court to conclude that the "core purpose" of the right to the assistance of counsel is to "assure 'Assistance' at trial when the accused is confronted with both the intricacies of the law and advocacy of the public prosecutor." *Ash,* 413 US at 309.

While the right to counsel under the Sixth Amendment, as the right to be free from compelled self-incrimination under the Fifth Amendment, is rooted in the courtroom setting, the protections afforded by the Sixth Amend-

ment have not been limited to the narrow scope of representation during the formal trial. As criminal procedure has changed, the breadth of the right to the assistance of counsel has also changed so that the immutable interests protected by that right are not diluted. See example *United States v Wade,* 388 US 218 (1967). Expansion of the application of the protections embodied within the Sixth Amendment is not controlled merely by the predilections of the court but rather the right to counsel has only been expanded "when new contexts appear presenting the same dangers that gave birth initially to the right itself." *United States v Ash,* 413 US at 311. Thus, the initial question to be addressed is whether the event, police interrogation, and the procedural timing of that event, between initial arraignment request for counsel and first contact with appointed counsel, present the same dangers that led to the adoption of the Sixth Amendment.

The first question is whether the right to counsel under the Sixth Amendment had attached at the time Respondent was interrogated. This court has expanded the Sixth Amendment right beyond the courtroom to certain "critical" pretrial stages of the proceedings. *United States v Gouveia,* — US —; 104 SCt 2292, 2298 (1984). The question then is whether the instant case had reached a critical stage at the time Respondent was interrogated.

This court has established by a plurality in *Kirby v Illinois,* 406 US 682 (1972) and by a majority in *United States v Gouveia,* — US —; 104 SCt 2292, 2296 (1984):

> That the Sixth Amendment right to counsel attaches *only* when formal judicial proceedings are initiated against an individual by way of indictment, informa-

tion, arraignment, or preliminary hearing. (Emphasis added).[4]

Petitioner is aware that in *Brewer v Williams,* 430 US 387 (1977), this court found a violation of defendant's Sixth Amendment right to counsel where the proceedings has only advanced to the stage of arraignment on the original arrest warrant. Nonetheless, Petitioner submits to this court that the Sixth Amendment right to counsel had not yet attached in the instant case even though defendant had been arraigned on the original arrest warrant. Apparently it was assumed that the Sixth Amendment applied to the circumstances of *Brewer v Williams* and perhaps this question was not there litigated. Further, since the question is one of procedure, it must be analyzed under the peculiarities of the procedure of each state. See *Anonymous v Baker,* 360 US 287, 290-291 (1959).

The Sixth Amendment Had Not Attached

In Michigan, any person charged with a felony, after arrest, must be brought before a Magistrate or District Court Judge without unnecessary delay for his initial arraignment. MCL § 764.26; MSA § 28.85. When unreasonable delay has been employed as a tool to extract a statement from the defendant, Michigan law precludes admission of that statement. *People v Bladel & Jackson,* 421

[4]It is true that this court in *Escobedo v Illinois,* 378 US 478 (1964) applied Sixth Amendment analysis to custodial interrogation which occurred prior to any formal charges being brought. Petitioner submits, however, that the *Escobedo* case and its protections have been fully subsumed by *Miranda* and that, in fact, *Escobedo's* extension of the Sixth Amendment right to instances occurring prior to the filing of formal charges has been overruled by *Kirby* and *Gouveia.*

Mich 79; 365 NW2d 56 (1985). The speedy arraignment required by statute is administered by a District Judge who has no jurisdiction to accept a plea of guilty to a felony charge, but who must read the contents of the charges against the defendant, inform him of his right to preliminary examination, his right to an attorney either retained or appointed and his right to bond. If a defendant so desires, he may have a preliminary examination. The preliminary examination must be held within 12 days after arraignment. MCLA § 766.4; MSA 28.922. The 12 day requirement is jurisdictional. MCLA § 766.7; MSA 28.925. *People v Weston,* 413 Mich 372, 319 NW2d 537 (1982).

The District Judge who arraigned Respondent was without jurisdiction to enter a conviction against defendant by plea or otherwise. Under this particular state procedure, Petitioner submits that no critical stage of the proceedings had been reached until the preliminary examination. The use of the terminology "indictment, information, arraignment or preliminary hearing" in *Gouveia* is somewhat difficult to apply without knowing how this court was using those terms. Petitioner submits that the preliminary hearing terminology used by the court denotes the earliest point at which the Sixth Amendment right attaches under procedures like those employed in Michigan. While the defendant had been arraigned in the instant case, there is also a second arraignment in Michigan procedure which occurs in the Circuit Court following bindover after preliminary examination, at which time defendant has his first opportunity to enter a plea in a court with jurisdiction to render a final decision in a felony case. Thus, Petitioner submits that under the Sixth Amendment precedent of this court, the Sixth Amendment right to

counsel had not yet attached at the time defendant was interrogated and therefore it could not have been violated and the Michigan Supreme Court must be reversed.

There is no reason why this court should extend the protection of the Sixth Amendment any farther than Petitioner believes it already has. The defendant's rights are fully protected in the context of custodial interrogation between initial arraignment and preliminary examination by the Fifth Amendment right to counsel established in *Miranda.* Further, the Sixth Amendment concern dealt with in *Powell v Alabama, supra,* that of adequate time for trial preparation, is fully protected by the presence of counsel at the preliminary examination, the greatest discovery tool for the defense, and the provision of counsel from the time of the preliminary examination until trial which is more than adequate time for preparation. Simply put, there is no significant interest of the defendant that needs the additional protection of the Sixth Amendment with its consequent burden on the State.

Any Sixth Amendment Right To Counsel Was Waived

While it is clear that Petitioner would be successful if this court finds that the Sixth Amendment had not attached at the time Respondent gave the challenged confession, prudence compels Petitioner to continue the analysis of this case assuming arguendo that the Sixth Amendment right to counsel had attached.

If the Sixth Amendment right to counsel had attached at the time Respondent was interrogated, *Massiah v United States,* 377 US 201 (1964) makes it certain that the Sixth Amendment applies to the event. *Massiah* stands for

the proposition that once a critical stage of the proceedings has been reached, elicitation of incriminating statements from a defendant by police in the absence of counsel or waiver of the presence of counsel is a violation of the Sixth Amendment. Other of this court's cases which have dealt with Sixth Amendment analysis of the propriety of police-elicitation of incriminating statements from a criminal defendant are *Brewer v Williams,* 430 US 387 (1979), *United States v Henry,* 447 US 268 (1980) and *Escobedo v Illinois,* 378 US 478 (1964). Comparison of the facts in the instant case with the four major Sixth Amendment-incriminating statement cases of this court shows that none of the problems that arose in those four cases were present in the instant case and thus there was no violation of defendant's Sixth Amendment rights.

In *Massiah, supra,* defendant had retained a lawyer, entered a plea of not guilty and been released on bail. While on bail, government agents were able to convince Massiah's co-defendant to put a radio transmitter in his automobile so that when the co-defendant and Massiah rode together the government agents could intercept the conversations between Massiah and his co-defendant. While acting much as an agent for the government, Massiah's co-defendant engaged in lengthy conversations with Massiah within the co-defendant's automobile. The conversations included several incriminating statements which were used against Massiah at trial. This court found a Sixth Amendment violation. In *Massiah,* there was clearly an interference with a then existing attorney-client relationship without any waiver of the defendant's Sixth Amendment rights due to the surreptitious means by which the incriminating statements were obtained.

In *Escobedo, supra,* the defendant had retained counsel to represent him in connection with charges arising out of the murder of Escobedo's brother-in-law. The incriminating statements admitted into evidence against Escobedo were obtained only after hours of repeated questioning which continued despite defendant's insistence that he would like to have the advice of his counsel before making any statement. *Escobedo, supra,* 378 US at 479. Additionally, Escobedo's attorney attempted to make contact with Escobedo but was denied the opportunity to do so. *Escobedo, supra,* 378 US at 480-481. Finally, when Escobedo asked to talk with his attorney after having seen him at the police station, Escobedo was told that his attorney did not want to speak with him even though the police knew well that Escobedo's attorney did want to speak with him. Ecobedo was neither advised of his right to remain silent nor any right to the presence of counsel nor did he waive those rights. Again, in *Escobedo,* a Sixth Amendment violation was found where there was interference with a then existing attorney-client relationship and there was no advice or waiver of any right to have contact with counsel.

In *Brewer v Williams, supra,* defendant Williams contacted his attorney apparently with the message that Williams decided to turn himself in on an outstanding warrant for murder. The attorney contacted the police to arrange for the surrender of Williams to police in Davenport, Iowa and his transportation to Des Moines where he would stand trial. *Williams, supra,* 430 US at 390. Contact was made with an attorney in Davenport who was apparently present during the arraignment of Williams which occurred in Davenport. Both the attorney at Davenport and

the one at Des Moines advised defendant not to speak with police. Further, both attorneys reached agreement with the transporting officers that they would not interrogate Williams during the ride from Davenport to Des Moines. *Brewer v Williams, supra,* 430 US at 391-392. Before getting into the car to be transported to Des Moines, defendant was advised of his Miranda rights by Detective Leaming. Rather than waiving those rights, defendant reaffirmed his position through counsel that there was to be no questioning of the defendant during the ride to Des Moines. *Brewer v Williams, id.* At the completion of the infamous "Christian burial speech", Defendant Williams made incriminating statements. While this court found that Williams appeared to understand his right to counsel, there was no evidence that Williams desired to relinquish that right. In fact, this court found that "Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Williams, supra,* 430 US at 404. Again, the Sixth Amendment violation was found where there was an interference by police with a then existing attorney-client relationship where the right to the presence of counsel had not been waived.

The final note of the quartet of Sixth Amendment cases was sounded in *United States v Henry,* 447 US 264 (1980). In *Henry,* the defendant was incarcerated awaiting trial on a bank robbery charge. Before counsel was appointed for Henry, see 447 US at 226, government agents made contact with a cell-mate of Henry who had been a confidential informant for the FBI in the past. While the agents only asked the cell-mate to listen for incriminating statements made by Henry, the testimony of the cell-mate in-

dicated that he elicited much of the information which was incriminating against Henry during conversations within the jail, even after appointment of counsel. The use of an undisclosed undercover informant to elicit incriminating statements from Henry was found to have violated Henry's Sixth Amendment rights since there could not have been a knowing and voluntary waiver of those rights where Henry was not even aware of his cell-mate's connection to the government. In *Henry* as in the previous cases, there was an interference with an existing attorney-client relationship where the right to the assistance of counsel was not waived.

The first distinguishing aspect between the case at bar and the four cases noted above is that there was no established attorney-client relationship which was interfered with by the challenged interrogation. While a notice of appointment had been sent out by the Court Administrator's Office, there is no indication that defense counsel had received that notice and the record reflects that defense counsel and defendant had never met. While it is true that, if the existence of an on-going attorney-client relationship is a prerequisite for a Sixth Amendment violation in the circumstances of the instant case, those with the financial ability to retain counsel may be in a better position than those who are indigent and have to depend on court appointed counsel, there is nonetheless adequate justification for such a rule.

The penalty exacted by the Michigan Supreme Court for the alleged violation of Respondent's Sixth Amendment rights was suppression of his confession. Suppression is a remedial device the use of which is controlled by careful cost-benefit analysis. *United States v Leon*, — US

—; 104 SCt 3405, 3412-3413 (1984). Under such analysis the relative evil of the police conduct is extremely relevant, if not controlling. The evil present in the knowing interference with an existing attorney-client relationship such as occurred in the four cases above, when compared to the innocent request for the opportunity to interrogate in the instant case, point toward the conclusion that the scales only tip in favor of the exclusion where the greater evil occurs. This issue will be dealt with more fully below when the practicalities of the Michigan Court's rule are discussed. (Note also the concerns articulated in the Michigan Code of Professional Responsibility DR 7-104, Communications with adverse party.)

None of this court's cases discussed above create a bar to governmental elicitation of incriminating statements from a defendant once his Sixth Amendment right to counsel has attached. The second problem in each of the four cases is that there was no waiver of that Sixth Amendment right before the incriminating statements were obtained. Petitioner submits that this is the most import distinguishing factor between the case at bar and the previous Sixth Amendment cases addressed by this Court. Petitioner submits that the Sixth Amendment right to counsel is waivable and that in the instant case, Respondent knowingly and intelligently relinquished his right to have counsel present during interrogation as that right is secured by the Sixth Amendment. (See e.g. *Faretta v California*, 422 US 806 (1975)).

While the Sixth Amendment right to the assistance of counsel is an extremely broad right in that it has application to many different circumstances, a proper analysis of the waiver question must focus only on that portion of

the Sixth Amendment right which must be waived in order to render the government elicited incriminating statement admissible. The narrow portion of the Sixth Amendment right to counsel involved in the instant case is the right to the presence of counsel during "post-indictment communications between the accused and agents of the government" whether or not the defendant is in custody at the time of the interrogation. *United States v Henry,* 447 US 264, 270 (1980). Thus, if defendant was adequately advised, understood and waived the right to the presence of counsel, the deficiency in the four previous cases has been overcome and the confession at bar should be admissible.

Miranda Warnings Lay A Proper Foundation For Sixth Amendment Waiver

The confession challenged at bar was made during what might be termed (if we accept that the Sixth Amendment had attached) critical-stage/custodial interrogation. Because of the coexistence of custody and a critical stage, the rights to the presence of counsel afforded by both the Fifth Amendment and Sixth Amendment overlapped. To avoid Fifth Amendment problems, the police properly advised Respondent of his Miranda rights. Petitioner submits that since the Fifth and Sixth Amendment rights to counsel, as they apply to the narrow circumstance of critical-stage/custodial interrogation, are identical in scope and purpose, a knowing, intelligent, and voluntary waiver of the right to the presence of counsel pursuant to Miranda warnings constitutes a waiver of those rights contained in both the Fifth and Sixth Amendments. This does not deny the analytical distinctions between the Fifth and Sixth Amendment rights to counsel, see *Rhode Island v*

Innis, 446 US 291, 300, Note 4, (1980), but it is to say that in the peculiar circumstances of this case, the overlap of the protections under the two amendments creates an identity between the cognitive content necessary for a knowing, intelligent and voluntary waiver of either the Fifth or Sixth Amendment right to counsel. (This analysis has been accepted in *United States v Karr,* 742 F2d 493 (9th Circuit, 1984)).

It has been suggested by some that there ought to be a higher standard of waiver for the Sixth Amendment right to counsel than the Fifth Amendment right to counsel. See *People v Bladel,* 421 Mich 79, Note 15 (1985). This Court, however, has stated that the standard to be met is that embodied in *Johnson v Zerbst,* 304 US at 464, the same standard that must be met for waiver of Fifth Amendment rights. *Brewer v Williams, supra,* 430 US at 404. Petitioner submits that that is the appropriate standard for it is difficult to comprehend how there can be a higher standard. Either a waiver is knowingly and intelligently made or is not. The only greater requirement that could be made is not one of a higher standard of waiver but of more evidence to support the fact of waiver. At least in the instant case, there is no reason at all to doubt the word of the detectives who testified, especially in light of the written waiver of defendant. *North Carolina v Butler, supra.* There is no higher ground on which to stand than that on which the waiver in the instant case is firmly planted.

The Sixth Amendment Requires No Edwards Protection

Even assuming that there was a valid waiver of defendant's Sixth Amendment right to counsel, the Michi-

gan Supreme Court was not satisfied with the constitutional protections afforded the defendant and instead decided that it was appropriate to suppress the reliable and valuable confession because, in the mind of the majority of the Michigan Supreme Court, the Sixth Amendment precludes police-initiated interrogation after defendant has invoked his Sixth Amendment right to counsel. The Michigan Supreme Court based its conclusion on an analogy to *Edwards v Arizona*. Petitioner submits that the circumstances of the instant case and *Edwards* are so disparate that analogous application of the *Edwards* rule to the instant case is most inappropriate.

The concerns involved in *Edwards v Arizona* have been discussed above. Essentially, *Edwards* is a prophylactic rule designed to prevent police from repeatedly requesting a defendant to relinquish his constitutional rights when the defendant has previously indicated his desire not to do so. In other words, the defendant should neither be beaten into submission or questioned into submission.

Edwards can only be properly applied by analogy if a police request that defendant submit to interrogation after defendant has invoked that portion of his Sixth Amendment right of which he was advised at arraignment would present the same danger of police badgering of the defendant into unwilling relinquishment of his constitutional rights. Petitioner submits that such a danger does not exist.

As more fully stated above, at his District Court arraignment, Respondent was advised of his right to have an attorney represent him at the preliminary examination and all subsequent proceedings. It was that narrow right which was clearly invoked by Respondent at his arraignment. There was nothing either in the content of the advice given by the District Court judge or in defendant's request for appointed counsel which in any way indicated that defendant did not wish to engage in further interrogation. There was nothing that indicated that defendant wished to deal with police only through counsel. Moreover, it would be serious error to conclude that every defendant who desires to have counsel represent him during judicial proceedings also wishes to speak with police only through counsel.

The facts of the Fifth Circuit case of *Nash v Estelle*, 597 F2d 513 (5th Circuit, 1979) are very helpful in seeing a circumstance in which a defendant clearly articulates both a desire to have counsel represent him during the judicial process and a desire to speak with the authorities without the presence of counsel. The following is an excerpt from an interview by an Assistant Prosecutor six days after Nash was arrested on a murder charge:

(Prosecutor Files)

Files: You want one to be appointed for you?

Nash: Yes, sir.

Files: OK. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh I kinda, you know, wanted, you know to talk about it, you know, to kinda you know, try to get it straightened out.

Files: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

Nash: I would like to have a lawyer, but I'd rather talk to you.

Files: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

Nash: No, I would rather talk to you.

Wiles: You would rather talk to me? You do not want to have a lawyer here right now?

Nash: No, sir.

Files: You are absolutely certain of that?

Nash: Yes, sir. (*Nash, supra,* at 516-517).

The subsequent taped confession was found to be admissible on the basis that it was permissible for defendant to unburden himself by confessing to his custodians, *Nash,* at 517, while still maintaining his right to be represented during judicial proceedings. This court's decision in *Smith v Illinois,* 469 US —, 105 SCt 490; 83 LEd2d 488 (1984) calls into question the admissibility of this statement because of the rather clear request for counsel initially made. Nonetheless, this case remains illustrative of an individual's desire to speak directly with police while maintaining the remainder of the incidents of the right to counsel.

The Fifth Circuit applied the *Nash* reasoning in a case with facts strikingly similar to those in the instant case. In *Blasingame v Estelle,* 604 F2d 893 (CA 5) (1979), defendant Blasingame was arrested late at night and arraigned the following morning. At that arraignment, he

was advised of his right to counsel and filled out a form requesting a court appointed attorney. That night, a Dallas police officer interviewed Blasingame after having advised Blasingame of his Miranda rights which Blasingame knowingly, intelligently and voluntarily waived. On appeal, Blasingame asserted that a Fifth Circuit predecessor of *Edwards v Arizona* precluded questioning after his unequivocal request for counsel at arraignment. The *Blasingame* court saw the issue this way:

> In evaluating this argument, the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.'
>
> *Nash v Estelle,* 597 F2d 513, 518 (CA 5) (1979). (*Blasingame* at 895).

The *Blasingame* court found that the right to counsel asserted by the defendant was not such that precluded later police-initiated interrogation and thus the rights asserted at arraignment were not impinged by the later inquiry. The *Blasingame* court said "Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present." (*Blasingame,* supra, at 895-896). After noting that the assertion of the right to counsel at arraignment was unrelated to his Fifth Amendment right to confer or have counsel present during custodial interrogation, the *Blasingame* court held that:

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment

is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation.

(*Blasingame, supra,* at 896).

In *Nash* and *Blasingame,* like *Jordan v Watkins,* 681 F2d 1067 (CA 5, 1982) and *Johnson v Commonwealth,* 55 SE2d 525 (VA 1979), the courts found that there was so little connection between the request for counsel at arraignment in exercise of the defendant's Sixth Amendment right to counsel and the subsequent interrogation, that the subsequent interrogation did not impinge on the right previously exercised.[5] The simple fact is that where a defendant has previously given notice of his intent to exercise one constitutional right a later police request to waive a different constitutional right can in no way impinge upon the original intent to exercise the first constitutional right. Under these circumstances, there is no danger that the defendant would be badgered to the point where he would unwillingly relinquish a right he sought to preserve.

The Virginia Supreme Court in *Johnson v Commonwealth, supra,* found guidance for dealing with the question in the instant case in this court's case of *Michigan v Mosley,* 423 US 96 (1975). *Mosley* provides much more guidance in resolving the issue in the instant case than does *Edwards v Arizona.* The added guidance arises out of the fact that while in *Edwards* the defendant was asked to relinquish the very right he had previously asserted, the defendant in *Mosley* was asked to relinquish his right to remain silent in a separate prosecution after previously invoking that right in regard to a different prosecution.

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[5]There are a number of cases which, though not without their problems in regard to the clarity of the rule therein ap-

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In *Michigan v Mosley, supra,* the defendant was arrested on a number of robbery charges. Detective Cowie interviewed the defendant about the robberies. During the interrogation, defendant Mosley exercised his right to remain silent, rather than his right to the presence of counsel. Two hours later, Detective Hill initiated interrogation of Mosley in reference to an unrelated homicide. The second interrogation began with advice and waiver of Miranda rights. On appeal, Mosley claimed that his assertion of the right to remain silent, made to Detective Cowie, precluded further police-initiated interrogation. This court found that Mosley's rights had not been violated.

The focus of this court's decision in *Mosley* was whether the defendant's " 'right to cut off questioning' was fully respected in this case." *Michigan v Mosley,* 423 US 103; 96 SCt 327. The court found that the defendant's rights were fully respected. *Miranda* did not state when interrogation could be resumed after an exercise of the right to remain silent. This court refused to hold that an exercise of the right to remain silent precludes all further interrogation. Neither would this court allow reinterrogation after a momentary pause. *Mosley, supra,* 423 US 107; 96 SCt 328. Thus, *Mosley* added to *Miranda* the rule that the right to remain silent prevents further police initiated interrogation until there has been a significant period during which the questioning has been suspended.

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plied, arguably involve circumstances where the request at arraignment has a close nexus to an invocation of right to where the request for counsel follows the arraigning Magistrate's recitation of Miranda warnings. (e.g. *Silva v Estelle,* 672 F2d 457 (CA 5, 1982)).

Another aspect of the reasoning in *Mosley* is that the defendant's exercise of his right to remain silent made during questioning by Detective Cowie was, at the most, ambiguous as to whether Mosley was desirous of talking about any other crimes. The court noted that in these circumstances, questioning on an unrelated crime was "quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies" *Mosley,* 423 US at 105; 96 SCt at 327. The advice of Miranda rights before the second interrogation gave the defendant a full and fair opportunity to once again invoke his right to remain silent. The subsequent advice of rights, though placing a minor burden on the defendant of having to once again assert his right to remain silent, if that was his desire, was heavily outweighted by the beneficial value of resolving any ambiguity in the defendant's previous invocation of his right to remain silent. The facts and reasoning of *Mosley* are far more in accord with the instant case than is *Edwards v Arizona.*

In the instant case, Respondent's request for counsel at arraignment does not necessarily indicate that defendant desires to only deal with police through counsel, the clear indication by the defendant in *Edwards.* Thus, subsequent questioning by the police was "quite consistent" with Respondent's previous request for counsel. Since the individuals who interrogated Respondent did not have previous contact with Respondent, their actions of reinitiating interrogation were not inconsistent with any previous statements that they had made; thus, defendant could not reasonably believe that his rights would not be honored.

As Petitioner stated at the beginning of this brief, the question presented in this case involves the balanc-

ing and intersection of the rights possessed by corporate society over against those of the individual defendant. It would be wrong to fall into the trap of the fallacy of exclusion of the middle. Petitioner does not argue in this brief that failure of the defendant at arraignment to state that he does not want to speak with the police constitutes a waiver of whatever Sixth Amendment right the defendant may have to the presence of counsel during interrogation. Petitioner's argument is not one that argues for displacement of the individual's interests by the interests of corporate society. Rather, Petitioner argues for a both/and rule. Petitioner argues that both society and the individual can be best protected by a rule which allows police-initiated interrogation prior to any indication by the defendant of a desire to deal with police only through counsel but that that interrogation can only take place once the defendant relinquishes his rights under the *Johnson v Zerbst* test.

The rule argued for by Petitioner places very little burden on Respondent. All Respondent needed to do to protect himself fully was to say "yes" when the detectives asked him if he wanted to have counsel present before any further interrogation occurred. This is no greater than the burden placed on the defendant in *Michigan v Mosley* to assert his desire to remain silent during the subsequent interrogation. There is no question but that Respondent's Sixth Amendment rights were scrupulously honored. Respondent's waiver of his right to the presence of counsel during interrogation was knowingly, intelligently and voluntarily made. There is absolutely no rational reason to suppress the challenged confession in the instant case.

Since none of the dangers presented by *Miranda, Edwards* or the quartet of Sixth Amendment cases are present in the instant case, Respondent's confession was obtained under circumstances where there is no risk of unreliability and no offense against Respondent's constitutional rights. Our adversary system of justice depends on the parties to develop the evidence diligently and for the courts to impose proper rules guaranteeing the reliability of that evidence so that the citizens whose daily lives are interrupted for jury service and who are charged with finding the truth can have available to them all possible means by which they can fulfill their duty of finding truth. A trial deprived of evidence as significant and reliable as the confession in the instant case would be a mockery and the jury would be defrauded. Admission of this confession would not create a risk that an innocent man would be convicted, see *Brewer v Williams,* 430 US at 437, but suppression of this evidence may well let a guilty murderer go free.

The Michigan Rule Results In Confusion Not Clarification

Finally, whether or not Respondent's rights were technically violated, suppression is not the proper remedy. The rule adopted by the Michigan Supreme Court is an "[i]ndiscriminate application of the exclusionary rule," that has already "generat[ed] disrespect for the law and the administration of justice." *United States v Leon,* — US —; 104 SCt 3405, 3413. The purpose of the exclusionary rule is to deter police conduct which violates the constitutional rights of a criminal defendant. The rule should not be applied where deterence cannot be thereby achieved. *Leon, supra,* — US —; 104 SCt at 3413-3414.

The "good faith" exception to the exclusionary rule now applied to Fourth Amendment cases is the natural extension of this court's pursuit of "bright line" rules for the establishment of when constitutional rights attach and police conduct is controlled. *Edwards* itself is a "bright line" rule case in that a specific event, a request for counsel made *TO POLICE* during custodial interrogation, controls police conduct. The rule argued for by Petitioner results in the same "bright line" as that in *Edwards.*

The rule proposed by the Michigan Supreme Court is not a "bright line", it is a "black hole". Common to both the "good faith" rule of *Leon* and the "bright line" rules of *Edwards* and *Berkemer v McCarty, supra,* is that the event which controls police conduct occurs in the presence of the police (be it the facial validity of a search warrant, the request for counsel made to police, or the placing of one in custody by an objective act) and thus the police have all the necessary information for the determination of appropriate self-conduct. The Michigan Supreme Court's rule, contrary to this, punishes police conduct on the basis of events which occur outside their presence, (i.e. a request for counsel made to a judicial officer). In this county at least, neither police nor prosecutor are typically present at the initial arraignment. Prisoners are brought to the courtroom by court officers who receive prisoners from the tunnel lock-up which connects the Jail and the Courthouse buildings. Simply put, the police are not major actors in the events which occur in the courtroom and often are not present. Police would be left to guesswork in determining whether it is proper to interview a particular prisoner under the Michigan Supreme Court's rule. Such a rule would result in sup-

pression of evidence in the most innocent of circumstances where, in the words of Justice Cardozo, "the constable . . . blundered". *People v DeFore,* 242 NY 13, 21; 150 NE 585, 587 (1926). *United States v Henry,* 447 US at 275. Adoption of the Michigan court's rule by this court would result in the spread of the disrespect for the law and the administration of justice already engendered by this rule.

CONCLUSION AND RELIEF

Confessions, voluntarily made, are relevant and probative evidence. This court said in *Oregon v Elstad,* supra, "voluntary statements 'remain a proper element of law enforcement.' *Miranda v Arizona,* 384 US at 478. 'Indeed, far from being prohibited by the constitution, admission of guilt by wrongdoers, if not coerced, are inherently desirable . . .' " *Oregon v Elstad,* — US —; 105 SCt 1285, 1291.

Respondent was acting as a free moral agent both when he murdered the three innocent trainmen at the Jackson Depot and when he confessed. True freedom, in our society, combines the freedom to act and the responsibility for those actions. Respondent is responsible for the murders and should suffer the consequences of his actions. The balance of fundamental interests embodied in the lasting principles of our constitution requires admissibility of Respondent's confession made after a knowing, intelligent and voluntary waiver of his constitutional rights. This guilty defendant ought not go free.

WHEREFORE, Petitioner respectfully requests that this Honorable Court reverse the judgment of the Michigan Supreme Court and affirm Respondent's conviction.

Respectfully submitted,

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Dated: July 10, 1985

No. 84-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN

Petitioner,

v.

RUDY BLADEL,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR RESPONDENT BLADEL

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SUMMARY OF ARGUMENT

At the time of Respondent Bladel's confession, his right to counsel had attached under both the Fifth and Sixth Amendments. Respondent had already made his first appearance at the district court arraignment where he had requested the appointment of counsel for all proceedings. The adversary proceedings had clearly commenced.

Respondent's Sixth Amendment right to counsel, in effect at the time of the interrogation, is a much broader right than the Fifth Amendment right to counsel. While the Sixth Amendment right applies to all critical stages of the criminal proceedings, the judicially created Fifth Amendment right only protects the accused's right against self-incrimination during custodial interrogation. While both rights apply to post-arraignment communication with the police as in this case, the Fifth Amendment violation requires a showing of custodial interrogation while the Sixth Amendment can be violated merely by deliberate elicitation of incriminating statements whether in a custodial or non-custodial setting. Also, a waiver of the Fifth Amendment right to counsel can be found by a showing that a suspect was advised of his *Miranda* rights and subsequently answered questions without any affirmative statement of waiver. Conversely, this Court has refused to find waiver in a Sixth Amendment "deliberate elicitation" case where the right to counsel was not affirmatively waived. These distinctions support the argument that the Sixth Amendment right is broader and less easily waived.

Because the Sixth Amendment right to counsel is a greater right than the corresponding Fifth Amendment right, waiver of the Sixth Amendment cannot be based upon the Fifth Amendment *Miranda* warnings. A Sixth Amendment waiver requires a higher level of comprehension on the part of the defendant to be truly knowing and

voluntary. The rule designed by this Court for waiver of the Sixth Amendment right *at trial* has application in the Sixth Amendment interrogation setting. The defendant should be advised not only of his right to counsel but also the fact of the indictment, the significance of the indictment and the seriousness of the defendant's situation should he choose to answer questions without counsel present. This waiver rule has been adopted by the Second Circuit Court of Appeals to assure actual comprehension of the Sixth Amendment right. Certainly, Respondent Bladel's alleged waiver of his *Miranda* rights did not meet this higher standard.

Even if this Court does not decide to set a higher waiver standard for the Sixth Amendment, this Court should find that a defendant who has invoked his Sixth Amendment right should be protected from police invitations to waive that right just as an accused who has exercised his lesser Fifth Amendment right is protected. Thus, the Fifth Amendment rule that bars police initiated interrogation of an accused who has indicated to the police that he desires a lawyer should be applied with equal force under the Sixth Amendment to the indicted defendant.

The above rule, adopted by the Michigan Supreme Court, is consistent with this Court's "bright line" cases. The rule will only serve to protect a defendant's Sixth Amendment right to counsel and to simplify questions of whether the right to counsel was violated. Courts will not have to draw unnecessary distinctions concerning the type of request for counsel: any request for counsel by a criminal suspect or criminal defendant bars further police initiated interrogation in the absence of counsel. This Court should adopt such a rule.

Finally, even if the Sixth Amendment is not deemed to protect a defendant from further police initiated interrogation after a request for counsel, this Court can find that Respondent Bladel's indication to the interrogating officers, after the reading of the *Miranda* advice, that he had requested counsel at arraignment, was a sufficient exercise of Respondent's Fifth Amendment right to counsel to bar further interrogation. The officers' absolute indifference to Respondent's indication that he had already requested counsel was a violation of Respondent's Fifth Amendment right which requires suppression of Respondent's confession.

ARGUMENT

On March 27, 1979, three days after his request at arraignment for the appointment of counsel, but one day prior to his first meeting with counsel, Respondent Rudy Bladel was visited in the Jackson County Jail by two police officers. The officers advised Respondent of his *Miranda*[1] rights including the right to counsel. At the point counsel was mentioned, Respondent indicated that he had requested counsel at his arraignment. The officers responded by asking Respondent to waive his right to counsel. Respondent signed a waiver of his rights and confessed to three murders.

The Michigan Court of Appeals reversed Respondent's convictions and held that his confession was illegally obtained on the authority of *Edwards* v. *Arizona*, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981); *People* v. *Bladel*, 118 Mich. App. 498; 325 N.W.2d 421 (1982). On appeal by the prosecutor (Petitioner herein), the Michigan Supreme Court affirmed the decision of the Court of Appeals, holding that the Sixth and Fourteenth Amend-

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[1] *Miranda* v. *Arizona*,384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

ments[2] protect an accused from continued police interrogation after the accused has invoked his right to counsel at arraignment by requesting the appointment of counsel. *People* v. *Bladel (After Remand)*, 421 Mich. 39; 365 N.W.2d 56 (1984).

In reaching the above decision, the Michigan Supreme Court relied upon the following analysis:

> 1) At the time of Respondent's confession, his right to counsel had attached under both the Fifth[3] and Sixth Amendments;
>
> 2) The Sixth Amendment right to counsel is at least as important as the judicially created Fifth Amendment right, if not more so;
>
> 3) The Sixth Amendment right to counsel is considerably broader than the Fifth Amendment right;
>
> 4) A waiver of the greater Sixth Amendment right to counsel after that right has been invoked cannot be based soley on a waiver of the Fifth Amendment *Miranda* rights;
>
> 5) At a minimum, the protections afforded pursuant to *Edwards* v. *Arizona* to an accused who has invoked his lesser Fifth Amendment right must be extended, by analogy, to the accused who has invoked his Sixth Amendment right.

The Michigan Supreme Court correctly found that because Respondent Bladel was subjected to police-initiated interrogation after he had requested the appointment of counsel, his subsequent confession had to be suppressed. This holding is consistent with the prior rulings of this Court. Indeed, the Michigan Court's decision

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[2] U.S. Const. Ams. VI, XIV.

[3] U.S. Const, Am. V.

is the logical result of this Court's prior rulings on the importance and sanctity of the Sixth Amendment right to counsel. The decision of the Michigan Supreme Court should be affirmed.

Respondent's Sixth Amendment Right Had Attached.

Initially, it is clear that at the time of the post-arraignment interrogation, Respondent's Sixth Amendment right to counsel had attached. In fact, Respondent explicitly exercised that right at arraignment by requesting the appointment of counsel. This Court has repeatedly held that the Sixth Amendment right attaches as soon as judicial proceedings are initiated against the accused, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689; 92 S.Ct. 1877, 1882; 32 L.Ed.2d 411 (1972); *United States* v. *Gouveia*, ___ U.S. ___; 104 S.Ct. 2292, 2296; 81 L.Ed.2d 146 (1984).

Moreover, the Sixth Amendment is not limited to the courtroom. In *Brewer* v. *Williams*, 430 U.S. 387, 401; 97 S.Ct. 1232, 1240; 51 L.Ed.2d 424 (1977), this Court reiterated that under the Sixth Amendment, "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."

Despite this Court's very clear statements concerning the attachment of the Sixth Amendment at the initial arraignment, Petitioner argues that Respondent's Sixth Amendment right did *not* attach at his arraignment.[4]

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[4] Petitioner did not argue below that the Sixth Amendment had not attached. Indeed, Petitioner has previously conceded that Respondent's Sixth Amendment right had attached at the time of the post-arraignment interrogation. *People* v. *Bladel*, supra, 421 Mich. at 77 (Boyle, J., dissenting).

Apparently, Petitioner would have this Court rule that a criminal defendant in Michigan does not have a Sixth Amendment right to counsel until he walks into the courtroom for the preliminary examination, up to twelve days after the initial arraignment. See Petitioner's Brief, pp. 20, 25-26.

Petitioner's argument on this point is without any support in the caselaw. In fact, Petitioner's argument ignores this Court's very specific language on the importance of the assistance of counsel as soon as the prosecution has begun:

> This view no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, where the Court noted that "* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants * * * [are] as much entitled to such aid [of counsel] during that period as at the trial itself. *Id.*, 287 U.S., at 57, 53 S.Ct., at 59, 77 L.Ed. 158. *Massiah* v. *United States*, 377 U.S. 201, 205; 84 S.Ct. 1199, 1202; 12 L.Ed.2d 246 (1964).

As the Michigan Supreme Court held and as Petitioner had previously conceded, Respondent Rudy Bladel was entitled, under the Sixth Amendment, to the assistance of counsel when he was "faced with the prosecutorial forces of organized society" at his post-arraignment interrogation. *Kirby* v. *Illinois*, supra, 406 U.S. at 689.

The Sixth Amendment Right To Counsel Is A Broader And More Fundamental Right Than The Judicially Created Fifth Amendment Right To Counsel.

As noted, prior to the post-arraignment interrogation, the Jackson police detectives read Respondent his

Miranda rights and obtained from him a signed waiver of those rights. Petitioner argues that despite the fact that the police were aware that Respondent had previously requested but not yet consulted with counsel, Respondent's apparent waiver of his *Miranda* rights was sufficient to waive whatever right to counsel he may have had. Such an argument unfairly diminishes the effect of Respondent's request for counsel and denigrates the importance of the Sixth Amendment.

This Court must first recognize, as did the Michigan Supreme Court, the differences between the Fifth and Sixth Amendments and the respective rights to counsel. Originally, the right to the assistance of counsel was only required within the scope of the Sixth Amendment: *after* the initiation of the criminal prosecution. *Powell* v. *Alabama*, supra. However, in *Miranda* v. *Arizona*, supra, this Court held that a criminal suspect has a right under the Fifth Amendment to have counsel present during any custodial interrogation. This right to counsel applies regardless of whether judicial proceedings have been initiated against the accused and thus, is independent of the Sixth Amendment right to counsel. In order to make the Fifth Amendment protections effective, the Court developed the requirement of warnings whereby the interrogator must advise the suspect that he has the right to remain silent, that anything said can and will be used against him, and that he has the right to consult with an attorney and have one present during questioning. 384 U.S. at 467-473.

If these warnings are given and understood by the accused and the accused agrees to speak to the authorities without asserting any of the rights, the Fifth Amendment protections can be effectively waived. *North Carolina* v. *Butler*, 441 U.S. 369; 99 S.Ct. 1755; 60 L.Ed.2d

286 (1979). However, if the suspect asks to speak to a lawyer, he is not subject to further interrogation until counsel has been made available, unless the accused himself initiates further communication with the police. *Edwards* v. *Arizona*, supra.

The more fundamental right to counsel is found in the Sixth Amendment. As discussed above, the purpose of the Sixth Amendment right to counsel is to provide legal assistance throughout all critical stages of the criminal judicial process. It is, therefore, much broader than the right to counsel conferred by the Fifth Amendment which "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber* v. *California*, 384 U.S. 757, 761; 86 S.Ct. 1826, 1830; 16 L.Ed.2d 908 (1966). Moreover, not only is the Sixth Amendment right to counsel broader in purpose and scope than the corresponding Fifth Amendment right, but also "the policies underlying the two constitutional protections are quite distinct." *Rhode Island* v. *Innis*, 446 U.S. 291, 300, n.4; 100 S.Ct. 1682, 1689, n.4; 64 L.Ed.2d 297 (1980).

That the two constitutional protections are distinct is demonstrated by this Court's decisions in the three major cases concerning the Sixth Amendment right to counsel during police elicitation of incriminating statements. *Massiah* v. *United States*, supra; *Brewer* v. *Williams*, supra; *United States* v. *Henry*, 447 U.S. 264; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980). These cases establish two important distinctions between the Fifth and Sixth Amendment rights, both of which lead to the conclusion that the Sixth Amendment right to counsel is broader and more difficult to waive.

In order to show a violation of the Fifth Amendment, the defendant must first show that he was subject to custodial police interrogation. *Miranda* v. *Arizona*, supra, 384 U.S. at 444. A Sixth Amendment violation on the other hand, does not require interrogation but merely "deliberate elicitation" of incriminating statements. *United States* v. *Henry*, supra, 447 U.S. at 272. Moreover, such elicitation without counsel can violate the Sixth Amendment even in the absence of custody. *Massiah* v. *United States*, supra, 377 U.S. at 206.

The second major distinction between the two corresponding rights to counsel involves waiver. As noted earlier, a waiver of the Fifth Amendment right to counsel can be found by a showing that the suspect was advised of his *Miranda* rights and subsequently answered questions without any affirmative indication of waiver. *North Carolina* v. *Butler*, supra, 441 U.S. at 374. In *Brewer* v. *Williams*, supra, 430 U.S. at 405, the Court held that the defendant did not validly waive his Sixth Amendment right to counsel where he did not affirmatively relinquish it prior to the police officer's deliberate elicitation of incriminating statements. Thus, while the Fifth Amendment does not necessarily require an explicit waiver, the Sixth Amendment clearly does.

This Court's prior decisions strongly support the conclusion of the Michigan Supreme Court that the Sixth Amendment right to counsel during interrogation must be at least as important and effective as the Fifth Amendment right. Certainly, the Sixth Amendment right is "considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution." *People* v. *Bladel*, 421 Mich. at 53. The Petitioner's contention that the right to counsel invoked by Respond-

ent at arraignment was a "narrow right" which did not differ in purpose and scope from the Fifth Amendment right must be rejected.

The Fifth Amendment Waiver Conceived In The *Miranda* Decision Is Not Adequate To Waive The Greater Sixth Amendment Right To Counsel.

Because the Sixth Amendment right to counsel is a greater right than that provided by the Fifth Amendment, it follows that the Miranda warnings/waiver, designed strictly to protect a suspect's right against self-incrimination in a pre-indictment, custodial setting, cannot provide the basis for a knowing waiver of an indicted defendant's Sixth Amendment right. This conclusion is merely a logical extension of this Court's Sixth Amendment decisions.

A general, but strict, standard for waiver of the Sixth Amendment right to counsel was stated by this Court in *Johnson* v. *Zerbst*, 304 U.S. 458, 464; 58 S.Ct. 1019; 82 L.Ed. 1461 (1937): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Thus, the State bears the heavy burden of showing that the accused both comprehended and relinquished his right to counsel. Moreover, the courts must indulge in every reasonable presumption against waiver. *Brewer* v. *Williams*, supra, *Bookhart* v. *Janis*, 384 U.S. 1; 86 S.Ct. 1245; 16 L.Ed.2d 314 (1966).

This Court has held that the *Johnson* v. *Zerbst* waiver standard applies both in cases of alleged waiver of the Fifth Amendment right, *Edwards* v. *Arizona*, supra, 451 U.S. at 482, and alleged waiver of the Sixth Amendment right. *Brewer* v. *Williams*, supra, 430 U.S. at 404. Nevertheless, this Court seems to have applied that standard

more strictly in Sixth Amendment cases. Moreover, many other courts and commentators have come to the conclusion that a waiver of *Miranda* rights is inadequate to waive the greater Sixth Amendment right to counsel.

As discussed above, the *Brewer* decision indicates that a Sixth Amendment waiver must be explicit while a Fifth Amendment waiver, under *North Carolina* v. *Butler*, need not be. Thus, the Sixth Amendment must be harder to waive as it requires some spoken or written statement of waiver by the defendant.

The only case in which this Court has fully discussed the requirements for a Sixth Amendment waiver is *Faretta* v. *California*, 422 U.S. 836; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). This Court, applying the knowing relinquishment standard of *Johnson* v. *Zerbst*, supra, found a valid waiver of defendant's Sixth Amendment right to counsel *at trial*. However, the Court emphasized that before such a waiver could be knowing, defendant:

> . . . should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams* v. *United States*, [317 U.S. 269, 279; 63 S.Ct. 236, 242; 87 L.Ed. 268 (1942)]; *Faretta* v. *California*, supra, 422 U.S. at 835.

According to the *Faretta* decision then, a waiver of the right to counsel at trial requires that the defendant asserting his right to waive clearly understand the risks of proceeding without counsel and that this advice of risks be imparted by the trial judge. Unlike the requirements for Fifth Amendment waiver under *Miranda* where the suspect must only be advised of the right itself, Sixth Amendment waiver under *Faretta* requires comprehension of the risk of waiving the right. Thus, a much higher

standard of comprehension is required to show waiver of the Sixth Amendment as opposed to the Fifth Amendment right to counsel.

Although this Court has never explicitly addressed the issue of whether this higher standard of waiver is applicable to pretrial waivers under the Sixth Amendment, the Court has indicated that the stricter standard is applicable to all waivers of the Sixth Amendment right to counsel. In *Brewer* v. *Williams*, supra, the Court, as in *Faretta*, applied the knowing relinguishment standard of *Johnson* v. *Zerbst*, supra, and stated:

> This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or of a critical stage of pretrial proceedings. 430 U.S. at 404.

Due to the greater importance of the Sixth Amendment right to counsel and the greater protections afforded the accused under the Sixth Amendment, all allegations of waiver under the Sixth Amendment must be judged under the *Faretta* standards and not the more lenient Fifth Amendment-*Miranda* standards. Although this position has never been explicitly adopted by the United States Supreme Court, it has gained much support among various courts and commentators. A clear rationale for the rule was aptly stated as follows:

> The Supreme Court's decision to find the sixth amendment right to counsel relevant only at or after the initiation of adversary judicial proceedings suggests that the *sixth amendment right should be more difficult to waive than the analogous fifth amendment right*. The assistance of counsel assumes greater importance in the crucial stage after the filing of formal charges for two reasons. First, the attorney no longer serves merely as a defensive shield to protect the suspect from self-incrimination, but becomes the accused's representative in conflict

> with the mobilized prosecutorial forces of the state. Second, once prosecution has commenced, the attorney must guide the accused through the substantive and procedural complexities of the criminal law. Furthermore, the state's need for the accused's confession is also greatly diminished, as indictment presumably indicates that the state has gained sufficient evidence to prove the guilt of the accused. *Under these circumstances, the state should be subject to a greater burden in establishing relinquishment of the more important sixth amendment right than in establishing relinquishment of the fifth amendment right*. Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 Col. L. Rev. 363, 372-373 (1982); (emphasis added; footnotes omitted).[5]

The Second Circuit Court of Appeals applied a higher Sixth Amendment waiver standard in *Unites States* v. *Mohabir*, 624 F.2d 1140 (CA 2, 1980). In *Mohabir*, defendant was interrogated by the prosecutor following indictment but prior to the appointment of counsel. At the interrogation, the prosecutor gave defendant his *Miranda* warnings which defendant agreed to waive. In fact, both parties on appeal agreed that *Miranda* had been complied with. The Second Circuit found that the *Miranda* waiver was only the beginning of the analysis as defendant's Sixth Amendment right to counsel had

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[5] See also: Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 35 (1979) [". . . no effort to elicit information from the defendant should occur unless the police seek to notify counsel. In cases where no lawyer exists to be notified, a waiver should be required to meet the standards that govern waiver of the right to counsel at trial. Any other standard undermines *Massiah*'s rationale."]
Note *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U.L. Rev. 738 (1980).

attached at the indictment and that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." *Id*, at 1146.

Following an extensive review of United States Supreme Court decisions as well as earlier decisions from the Second Circuit, the *Mohabir* Court held that a valid waiver of the Sixth Amendment right to counsel during post-indictment interrogation "must be preceded by a federal judicial officer's explanation of the content and significance of this right." *Id*, at 1153. Such an explanation must include the fact that the indictment has been filed, the significance of the indictment, the right to counsel and "the seriousness of [the accused's] situation in the event he should decide to answer questions . . . in the absence of counsel." *Id*. The Court held that only such a complete advice of rights would assure comprehension of the Sixth Amendment right pursuant to *Brewer* v. *Williams* and *Faretta* v. *California*.

The *Mohabir* decision was not a radical departure from earlier cases but merely the culmination of prior decisions of the Second Circuit which had held that any waiver under the Sixth Amendment had to be governed by higher standards than a Fifth Amendment waiver. See *Carvey* v. *LeFevre*, 611 F.2d 19 (CA 2, 1979), cert denied, 446 U.S. 921; 100 S.Ct. 1858; 64 L.Ed.2d 276 (1980); *United States* v. *Satterfield*, 558 F.2d 655 (CA 1, 1976). A Sixth Amendment waiver "requires the clearest and most explicit explanation and understanding of what is being given up." *Carvey* v. *LeFevre*, supra, at 22, n.1. Accordingly, the mere giving of *Miranda* warnings may not suffice to call the defendant's attention to the enormity of his contemplated decision.[6]

[6] Other jurisdictions, while not imposing the Second Circuit's strict *Faretta*-type waiver rule, have recognized that a Sixth Amendment waiver requires a higher level of comprehension on the part of the defendant than is provided by *Miranda* warnings. See *United States* v. *Clements*, 713 F.2d 1030 (CA 4, 1983); *State* v. *Wyer*, 320 SE.2d 93 (W. Va. 1984); *State* v. *Sparklin*, 296 Or. 65; 672 P.2d 1182 (1983).

Applying the *Mohabir/Faretta* waiver standards to the instant case, it is clear that Respondent Bladel did not knowingly waive his Sixth Amendment right to counsel. At no time did anyone advise Respondent of the nature of his Sixth Amendment right to counsel. Certainly Respondent's alleged waiver was not made with the intelligence and knowledge that he would have obtained had he consulted with counsel. Indeed, Respondent Bladel had not spoken with any attorney, other than the prosecutor, prior to making his statements. Respondent was not only counselless at the time of interrogation, he was uncounselled.

Due To The Greater Importance Of The Right To Counsel After Initiation Of Judicial Proceedings And The Higher Waiver Standard Of The Sixth Amendment, The Prophylactic Rule Of *Edwards* v. *Arizona* Should Be Extended To The Sixth Amendment.

The Michigan Supreme Court in this case did not undertake to define precise requirements for waiver of the Sixth Amendment right to counsel. The Court merely held that because the Sixth Amendment provides a greater and more fundamental right to counsel than the Fifth Amendment and because the Fifth Amendment waiver of *Miranda* rights is adequate to waive the Sixth Amendment once it attaches, the Sixth Amendment right "is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart." *People* v. *Bladel*, supra, 421 Mich. at 65.

One of the primary safeguards of the Fifth Amendment right to counsel and a direct result of this Court's land-

mark decision in *Miranda* v. *Arizona*, supra, is the rule of *Edwards* v. *Arizona*, supra. In *Edwards*, a confession was obtained by continued police interrogation after defendant had advised the police of his desire to have counsel present. This Court found that the continued interrogation in the absence of counsel violated defendant's right to counsel under *Miranda* v. *Arizona*, supra. The Court stated its holding as follows:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as *Edwards*, having expressed his desire to deal with the police through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards*, supra, 451 U.S. at 484-485.

It is entirely logical and consistent with the Constitution to extend the *Edwards* Fifth Amendment rule to situations implicating the Sixth Amendment right to counsel as the Michigan Supreme Court has done. The distinctions drawn by Petitioner, that *Edwards* should be limited to Fifth Amendment cases only and that Respondent herein did not direct his request for counsel to the police but to a judge, do not support his conclusion that the strict requirements of *Edwards* cannot apply to an indicted defendant who has "only" invoked his Sixth Amendment right. As the Michigan Supreme Court stated:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. *It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge*. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished. *People* v. *Bladel*, supra, 421 Mich. at 63-64.

Petitioner's argument not only "makes little sense," it is inherently illogical. Petitioner would have this Court hold that for purposes of waiver of the Sixth Amendment, the Fifth Amendment waiver designed by the *Miranda* decision is adequate. However, for purposes of protection from continued police interrogation after the Sixth Amendment right to counsel has been invoked, the Fifth Amendment protections contained in the *Edwards* decision are not appropriate. As the Michigan Supreme Court found, this argument ignores the differences between the two separate rights and in fact, denigates the Sixth Amendment right.

At the core of Petitioner's argument is the concept that the Sixth Amendment right is *not* the extensive right that this Court has recognized it to be. Petitioner argues that Respondent exercised only a "portion of his Sixth Amendment right" and that it was a "narrow right" he invoked at arraignment. (Petitioner's Brief at 34-35). The Sixth Amendment right to counsel has never been described in

the caselaw as a narrow right; certainly there is no authority for the proposition that the right can be exercised piecemeal. The Sixth Amendment right to counsel is a broad, fundamental right which, once attached, protects the defendant through *all* critical stages including interrogation. This Court should explicitly reject any argument which attempts to limit the critical Sixth Amendment right. Moreover, this Court should recognize, as did the Michigan Supreme Court, that providing less stringent safeguards for the Sixth Amendment right than the corresponding Fifth Amendment right effectively diminishes the importance of the Sixth Amendment.

In support of his argument, Petitioner relies primarily on decisions from the Fifth Circuit Court of Appeals. *Nash* v. *Estelle*, 597 F.2d 513 (CA 5, 1979); *Blassingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979); *Jordan* v. *Watkins*, 681 F.2d 1067 (CA 5, 1982). However, two of these cases were decided prior to *Edwards* while none of the cases "adequately distinguished the Fifth and Sixth Amendment rights." *People* v. *Bladel*, supra, 421 Mich. at 56.

In *Blassingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979), the defendant had been arraigned and had requested counsel prior to the interrogation which resulted in a confession. Inexplicably, the Fifth Circuit ignored the Sixth Amendment implications of the post-arraignment interrogation and found simply that the defendant had waived his Fifth Amendment rights prior to the confession. In *Jordan* v. *Watkins*, 681 F.2d 1067 (CA 5, 1982), the Court did briefly acknowledge that the defendant's Sixth Amendment right had attached at the arraignment. The Court then found that the post-arraignment interrogation was proper. Relying heavily on *Blassingame*, the Fifth Circuit found a voluntary, knowing and intelligent waiver of both the Fifth and Sixth Amendment rights to counsel. The *Jordan* Court distinguished *Edwards* because Jordan never invoked his right to counsel *during interrogation* and, therefore, did not indicate a desire to deal with police only through counsel. *Id.* at 1073.

As demonstrated above and as aptly stated by the Michigan Supreme Court, it should make no difference if a defendant directs his request for counsel to a judge as opposed to the police. Indeed, an average defendant may well assume that a request directed to a neutral judicial magistrate would be more likely to be honored. Unfortunately for Respondent Bladel, his request for counsel, directed to the district court judge, did not result in counsel until four days later, one day after Respondent's counselless, uncounseled confession.

A further problem with the Fifth Circuit line of cases cited by the Petitioner is that the Fifth Circuit is not at all consistent on the application of *Edwards* to post-arraignment confessions where the only request for counsel is made at arraignment. In *Silva* v. *Estelle*, 672 F.2d 457 (CA 5, 1982), defendant, *at arraignment*, requested to use the telephone to call his attorney. Approximately one hour after arraignment, defendant was approached by a police officer whereupon defendant waived his *Miranda* rights and dictated a written confession. Finding that defendant's request to call his lawyer "can only be construed as an exercise by the defendant of his right to an attorney," *Id.* at 458, the Fifth Circuit held that *Edwards* prohibited the later interrogation. The Court consequently found the confession inadmissible and reversed the conviction.

The Sixth Circuit has also applied the *Edwards* rule in a Sixth Amendment context. In *United States* v. *Campbell*,

721 F.2d 578 (1983), defendant was interrogated and confessed after his request for counsel at arraignment but before he had the opportunity to consult with counsel. Despite the apparent *Miranda* waiver at the post-arraignment interrogation, the Sixth Circuit held that *Edwards* barred the interrogation and prevented a finding of waiver. The Court specifically found that the interrogation of the defendant in the absence of counsel manifested "an indifference to, if not an intentional disregard for, an accused's Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination." *Id*, at 579. Because the agents knew that an attorney had been appointed (as did the interrogating officers in the instant case), the Court found that the government agents intentionally conducted "one last round of interrogation before [defendant] would have an opportunity to consult with counsel." *Id*.

Like the defendants in both *Silva* and *Campbell*, Respondent herein requested counsel only at arraignment and was then subjected to counselless, police-initiated interrogation by officers who were aware of the request for counsel. As Justice Marshall has stated, admission of the confession under such circumstances indicates a total disregard for the defendant's request for counsel and violates the spirit, if not the letter, of the *Edwards* decision. *Johnson* v. *Virginia*, 454 U.S. 920; 120 S.Ct. 422; 70 L.Ed.2d 231 (1981) [Marshall, J., dissenting].

Accordingly, Respondent's Sixth Amendment request for counsel is at least entitled to as much protection as an exercise of Respondent's Fifth Amendment rights would be. This Court should affirm the decision of the Michigan Supreme Court and find that it is appropriate and constitutionally necessary to extend the *Edwards* rule to situa-

tions where the accused has requested counsel at arraignment.

The Ruling Of The Michigan Supreme Court Is A "Bright Line" Rule Which Furthers The Purpose Of The Sixth Amendment Right To Counsel And Clearly Outlines The Rights Of The Defendant And The Duties Of The Police At Post-Arraignment Interrogations.

The decision of the Michigan Supreme Court will not, as Petitioner argues, result in confusion and guesswork by the police. In fact, the Court's decision to apply the *Edwards* safeguards to the Sixth Amendment is merely a rational extension of the "bright line" rule announced in *Edwards*. Thus, the Michigan ruling is both practical and constitutionally appropriate. Courts will no longer have to attempt to determine which right to counsel the defendant has invoked. Moreover, courts will no longer have to draw unnecessary distinctions over where or to whom the request for counsel is directed. The Michigan Supreme Court has greatly simplified the matter: any request for counsel by a criminal suspect or criminal defendant bars further police initiated interrogation.

The Michigan Supreme Court also held that the police, prior to interrogating a defendant must determine whether the defendant has been arraigned and has requested counsel. Clearly such a requirement is reasonable and necessary if the police are to scrupulously protect a defendant's right to counsel. Petitioner argues, however, that the police often do not know if counsel has been requested, and therefore, "would be left to guesswork in determining whether it is proper to interview a particular prisoner . . ." (Petitioner's Brief at 43).

This argument is specious. Respondent submits that even if the interrogating officer is not present at arraignment, only a very lazy police officer would be "left to

guesswork." A simple check with the court clerk or the prosecuting attorney could easily verify the defendant's status. As the Michigan Supreme Court observed, "[t]his duty is no more onerous than that imposed by *Edwards* . . ." *People* v. *Bladel*, supra, 421 Mich. at 66. Moreover, in this case, the chief investigating officer was present at Respondent's arraignment while the two interrogating officers were informed by Respondent of his request for counsel.

The interrogation of Respondent Bladel in the absence of counsel by police officers who were aware that Respondent had requested counsel was not a good faith action by the police. It was, as recognized by the Michigan Supreme Court, a deliberate attempt to conduct "one last round' of interrogation before counsel arrived." *Id.*, at 67. The officers exhibited at least an indifference to Respondent's request which negates any notion of good faith. If the police had intended to respect Respondent's right to counsel. they would have postponed the interrogation until Respondent had the opportunity to consult with counsel. Moreover, once the defendant's right to counsel has attached, the focus must be on the rights of the defendant not the culpability or innocence of the police. See *United States* v. *Agurs*, 427 U.S. 97, 109; 96 S.Ct. 2392; 29 L.Ed.2d 342 (1976).

Finally, the ruling of the Michigan Supreme Court will not negatively effect the ability of the police to solve crime. If anything, this decision will help assure that confessions are voluntary and not taken in violation of a defendant's right to counsel. In *Escobedo* v. *Illinois*, 378 U.S. 478, 489; 84 S.Ct. 1758, 1764; 12 L.Ed.2d 977 (1964), this Court recognized that law enforcement dependent upon confessions will be "less reliable and more subject to abuses than a system which depends upon extrinsic evi-

dence . . ." . The Court further noted that the State should not fear that honoring a suspect's rights will result in less confessions:

> This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . ." *Haynes* v. *Washington*, 373 U.S. 503, 519, 10 L.Ed.2d 513, 524, 83 S.Ct. 1336, 1346.
>
> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. 378 U.S. at 490; footnotes omitted.

Similarly, there is no reason to fear the rule announced by the Michigan Supreme Court herein. Extending the *Edwards* rule to the facts of the instant case will only have the positive effect of protecting the indicted defendant in the exercise of his constitutional right to counsel. As the ultimate arbiter of the rights of the citizens of this country, this Court should embrace and affirm that rule.

Respondent Bladel's Fifth Amendment Right To Counsel Was Violated Where The Police Interrogated Respondent After Being Advised That He Had Already Requested The Appointment Of Counsel.

Notwithstanding the analysis of Respondent's Sixth Amendment right to counsel, Respondent submits that his Fifth Amendment right was violated under *Edwards*

v. *Arizona*, supra, when the police continued interrogation after being advised by Respondent that he had requested counsel at arraignment.

According to the testimony of the two interrogating officers, Respondent advised the officers, prior to interrogation, that he had requested counsel at arraignment, that he had not yet seen an attorney and that he didn't know whether one had been appointed. Sergeant Wheeler described the exchange with Respondent as follows:

> Q. But, he did tell you that he had requested an attorney?
>
> A. Yes, sir.
>
> Q. And one hadn't shown up?
>
> A. Well, whether one hadn't shown up or he didn't know whether he had been appointed or not. Let's put it that way, he said he had requested one, but didn't know whether one had been appointed or not. (JA 49a)

Lieutenant Lowe also testified that he was advised by Respondent of his request for counsel:

> Q. All right, were you present when these rights were read to the defendant, Mr. Bladel?
>
> A. On the 26th of March, sir.
>
> Q. Yes.
>
> A. Yes, sir.
>
> Q. Did you hear Mr. Bladel state that he had requested an attorney?
>
> A. He had requested, yes, I heard him say that he had requested an attorney at his arraignment, sir.

> Q. Did you ask him whether or not he had seen an attorney?
>
> A. I think Mr. Bladel, his statement was that he had requested one at his arraignment, but he hadn't seen him yet. (JA 65a-66a).

Despite Respondent's clear statement to both officers that he had requested an attorney, the officers responded with complete indifference:

> Q. At any time did you attempt to ascertain whether or not an attorney had been appointed for Mr. Bladel?
>
> A. No, sir.
>
> Q. Did this become of concern to you after you read him his rights and that he reported to you that he had requested an attorney?
>
> A. No concern whatsoever. (JA 41a) [Testimony of Sgt. Wheeler]
>
> * * *
>
> Q. Did you cease questioning after he stated that he had requested an attorney?
>
> A. He didn't request an attorney be present during this interview, sir, his request was that he had said that he had requested an attorney at his arraignment.
>
> Q. And after learning that he had requested an attorney at the arraignment did you stop questioning at that point?
>
> A. No, sir, he was advised that if he wished to have an attorney present during this questioning that then he could at any time he wished have his attorney present.
>
> Q. Did you cease to question, did you cease the interview after you were informed that he had requested an attorney?

A. No, we did not. (JA 66a) [Testimony of Lt. Lowe].

It is critical that Respondent's statement that he had requested a lawyer followed immediately after the *Miranda* warnings. In direct response to the *Miranda* advice that a lawyer would be appointed, Respondent indicated that that would not be necessary, as *he had already requested a lawyer.* Respondent apparently believed that he had exercised his right to have counsel present at all stages of the proceedings including interrogation. The police, by their own testimony, simply chose to ignore Respondent's request for counsel.

In *Edwards* v. *Arizona*,supra, this Court imposed the rigid rule that once an accused indicates to the police that he desires counsel present during interrogation, the police may not initiate any further attempts to invite the accused to waive that right. The purpose of this rule is "to protect an accused in police custody from being badgered by police officers . . ." into waiving his rights once asserted. *Oregon* v. *Bradshaw,* 462 U.S. 1039; 103 S.Ct. 2830, 2834; 77 L.Ed.2d 405 (1983). The effectiveness of the request for counsel does not depend upon the accused's utterance of specific words or phrases. So long as the accused clearly indicates that he wants an attorney, the interrogation must cease. *Smith* v. *Illinois,* 469 U.S. ___; 105 S.Ct. 490; 83 L.Ed.2d 488 (1984).

In the instant case, given that Respondent requested counsel at arraignment and then advised the interrogating officers of this request immediately after the *Miranda* warnings, it must be concluded that Respondent had done all that he could to preserve his rights to counsel under both the Fifth and Sixth Amendments. Moreover, these circumstances should have been sufficient to alert the police that Respondent had exercised his rights. At that

point, the police were on notice that Respondent had made the decision that he was not capable of dealing with the prosecutorial forces without counsel. By having "no concern whatsoever" (JA 51a) that Respondent had invoked his right to counsel, the police effectively badgered Respondent into giving up his previously asserted right.

In deciding whether Respondent's statement that he had requested counsel should be viewed as an exercise of his right to counsel at interrogation, this Court should also examine the circumstances in which Respondent found himself when confronted by the police. Respondent was not only without counsel but he had been incarcerated for three days after his initial request without having consulted with counsel. As the record demonstrates, the delay in providing counsel was due to the district court's failure to immediately contact an attorney (JA 104a). Thus, the interrogating officers encountered Respondent at a time when he did not know what had become of his request for counsel and when "he began to doubt whether he would have counsel appointed." *People* v. *Bladel,* supra, 421 Mich. at 67. Moreover, the police did not know whether counsel had been appointed and admittedly, did not care.

Under the circumstances of this case, Respondent's communication to the police was the functional equivalent of a request for counsel at interrogation. Since the police proceeded to obtain a waiver and to interrogate Respondent after being advised of his request, the rule of *Edwards*, and, therefore, *Miranda* v. *Arizona*, supra, was violated. Respondent's confession must be suppressed.

CONCLUSION AND RELIEF

The interrogation of Respondent Bladel following his unequivocal request for counsel at arraignment was a violation of Respondent's Sixth Amendment right to counsel. The Michigan Supreme Court correctly analyzed the Constitution in arriving at this decision. This Court should adopt and affirm that decision. Alternatively, Respondent's indication to the police, in response to the *Miranda* advice that counsel would be appointed, that he had requested counsel was a sufficient exercise of Respondent's Fifth Amendment right under *Edwards* v. *Arizona*. Thus, the continued interrogation violated Defendant's Fifth Amendment right to counsel.

The decision of the Michigan Supreme Court was based in equal part on both the Michigan and Federal Constitutions. Thus, this case should minimally be remanded to the Michigan Supreme Court for reconsideration on state grounds if this Court reverses the decision of that Court.

WHEREFORE, Respondent respectfully requests this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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